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A TREATISE

ON THE LAW AFFECTING

RAILWAY COMPANIES

AS

Carriers of Goods and Live Stock.

BY

JOSEPH HAWORTH REDMAN,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW,

Author of "A Concise Treatise on the Law of Arbitrations and Awards," &c., joint Author of "The Law of Landlord and Tenant," &c.

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PREFACE

TO THE SECOND EDITION.

NEARLY ten years have elapsed since the publication of the first edition of this work. During that interval a number of decisions, and the passing of "The Regulation of Railways Act, 1873," have added much new matter to this branch of Railway law. This new matter I have incorporated in the present edition.

Whilst preserving in main outline the arrangement of the previous edition, a different sub-division into chapters has been adopted, a great portion of the work has been re-written, and two new chapters, dealing with "Passengers' Luggage" and "The Liability of Railway Companies as Warehousemen," have been added. In its present form, I hope the little book will be found to give a ready solution of every-day questions on the liability of Railway Companies as Carriers, and will not be unworthy the flattering kindness shown to the first edition.

J. H. REDMAN.

2, NEW COURT, CAREY STREET, LINCOLN'S INN,
May, 1880.

PREFACE

TO THE FIRST EDITION.

THE Author's object in the present Treatise has been to produce an *epitome* clear, concise and complete. Embodying the conclusions of the ablest text writers and the results of the latest decisions of the Courts, he hopes it may prove an acceptable compendium to members of the profession. At the same time, by avoiding as much as possible technical phraseology, he has endeavoured to give such a statement of existing law as may be easily comprehended by non-professional readers. It has not been thought necessary to burden the text with long strings of cases. The latest and leading cases have been cited to support a doctrine; on reference to them previous decisions on the point will generally be found collected.

November, 1870.

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The Law affecting Railway Companies as Carriers of Goods and Live Stock.

CHAPTER I.

GENERAL OUTLINE OF THE LIABILITY OF RAILWAY COMPANIES AS CARRIERS.

THE liability of railway companies as carriers arises partly under the customary or common law of England, and is partly defined by statute. Such companies may become (8 Vict. c. 20, s. 86), and by their special act it is often provided that they shall act as (*Pegler* v. *Monmouthshire Rail. Co.*, 30 L. J., Ex. 249; 6 H. & N. 644), and when in the ordinary course of their business they receive goods to convey and deliver, they are, common carriers (*Palmer* v. *Grand Junction Rail. Co.*, 4 M. & W. 749; *Crouch* v. *London and North Western Rail. Co.*, 23 L. J., C. P. 73; 14 C. B. 255; *Richards* v. *London and South Coast Rail. Co.*, 18 L. J., C. P. 251; 7 C. B. 839), with the benefit of every "protection and privilege" of common carriers. (8 Vict. c. 20, s. 89.)

Railway companies common carriers.

A common carrier is one who plies between certain termini, and openly professes to carry for hire the goods of all such persons as may choose to

Common carrier defined:

employ him. He may profess to carry all descriptions of goods or particular descriptions only.

Is an insurer.

In the absence of contract to the contrary with the customer, a common carrier is by common law an insurer of the goods entrusted to him; his warranty being safely and securely to carry and deliver, or, in other words, he impliedly undertakes to deliver the goods in the same condition in which he received them. (*Higginbotham* v. *Great Northern Rail. Co.*, 10 W. R. 358, per Pollock, C. B.) If goods delivered to a carrier do not arrive at their destination, or, when delivered there, are not the same in bulk or condition as when received by the carrier, this is a *primâ facie* breach of his warranty for which he is liable.

Excepted perils.

There are, however, certain perils and risks against which a carrier is not presumed to insure. If it can be shown that the loss or injury arose from one of these excepted perils, the carrier is not liable. The excepted perils are losses by the act of God, or the Queen's enemies, or resulting from the ordinary wear and tear and chafing of the goods in the course of transit, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent infirmities or intrinsic qualities, or from the negligence or fraud of the customer. (Story, Bails. s. 492 a; *Great Western Rail. Co.* v. *Blower*, 41 L. J., C. P. 268; L. R., 7 C. P. 655, per Willes, J.)

Act of God.

A loss is a loss by the "act of God" if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause; and a common carrier is entitled to immunity in

respect of a loss so occasioned if he can show that it could not have been prevented by any amount of foresight, pains, and care reasonably to be expected of him; and if he uses all the known means to which prudent and experienced carriers ordinarily have recourse to ensure the safety of goods entrusted to them under similar circumstances, he has done all that is to be reasonably required of him. (*Nugent* v. *Smith*, 45 L. J., C. P. 697; L. R., 1 C. P. D. 423; *Nichols* v. *Marsland*, L. R., 10 Ex. 258; 44 L. J., Ex. 134.)

Queen's enemies.

Loss by the "Queen's enemies" refers only to enemies with whom the reigning sovereign is at open war, and not to internal depredators—as thieves, rioters, or insurgents. (Jones, Bails. 104, 105.)

Intrinsic qualities of thing carried.

If perishable articles, say soft fruit, are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. (*Kendall* v. *London and South Western Rail. Co.*, 41 L. J., Ex. 184; L. R., 7 Ex. 373, per Bramwell, B.)

Neglect of the sender.

Where goods are apparently properly packed and secured in the manner in which such goods are usually packed or secured, but are in fact imperfectly packed, the defect not being patent, a loss resulting from this defect would be within the exception arising from the neglect of the customer. (See *North Eastern Rail. Co.* v. *Richardson*, 41 L. J., C. P. 60; L. R., 7 C. P. 75.)

Liable for everything but excepted perils,

Nothing but one of the before-mentioned perils will excuse the carrier where goods are lost or injured. So that at common law the carrier will

be liable though the goods are stolen, even by force, destroyed by accidental fire, or injured through the wrongful acts of third parties. (*Forward* v. *Pittard*, 1 T. R. 27; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389; *Gosling* v. *Higgins*, 1 Camp. 451.) Moreover, the above-mentioned exceptions only limit the liability, and not the duty of the carrier. It is his duty to do what he can, by reasonable skill and care, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care damage does occur, he is relieved from liability; but if his negligence has brought about the peril, the damage is attributable to his breach of duty and the exception does not aid him. (*Gill* v. *Manchester Sheffield, &c. Rail. Co.*, 42 L. J., Q. B. 89; L. R., 8 Q. B. 186, per Lush, J.)

and for those in case of neglect of duty.

A common carrier is such only of the goods he professes to carry.

A common carrier may be such of one class of goods and not of another. This depends upon the public profession he makes, either in terms or by his usual course of business, in the acceptance of particular classes of goods from all persons alike for the purpose of carriage.

Whether or not of live stock?

It has been much discussed whether railway companies who carry live animals are common carriers thereof. Whether they are or not, there is, in respect of their liability on the one hand, and their exemption from liability on the other, no distinction between live stock and other ordinary merchandise, so that on the principle that applies to loss from the inherent nature of goods, railway companies are exempt from liability for injury which happens to an animal by reason of

its own inherent vice. (*Great Western Rail. Co.* v. *Blower*, 41 L. J., C. P. 268; L. R., 7 C. P. 655; *Kendall* v. *London and South Western Rail. Co.*, 41 L. J., Ex. 184; L. R., 7 Ex. 373.) But a company may exclude the carrying of animals from their public profession of carriers, and receive and carry them only on special contracts as ordinary bailees for hire. (*North Eastern Rail. Co.* v. *Richardson*, 41 L. J., C. P. 60; L. R., 7 C. P. 75.)

Not of passengers.

As regards the persons of passengers, railway companies are not to be deemed common carriers, so as to be liable for all injuries and damages from which as common carriers they would not be excused. (Story, Bails. s. 499.) They are not insurers of the persons of passengers, and are only liable for want of due care. (*Readhead* v. *Midland Rail. Co.*, 38 L. J., Q. B. 169; L. R., 4 Q. B. 379.)

Common carriers of passengers' luggage.

With respect, however, to the ordinary or personal luggage of passengers which companies are bound to carry free of charge, they are common carriers, and therefore insurers. In fact, passengers' luggage is on the same footing as any other goods sent alone. (*Macrow* v. *Great Western Rail. Co.*, 40 L. J., Q. B. 300; L. R., 6 Q. B. 612; *Cohen* v. *Great Eastern Rail. Co.*, 45 L. J., Ex. 298, per Bramwell, B.)

Only common carriers of articles in the Carriers Act when they are declared.

Such in brief outline is the liability of railway companies at common law. By statute their general liability has been somewhat restricted. There are certain classes of goods for which they only become liable as common carriers when the sender at the time of delivery to the company

takes certain steps to attach this liability. While goods are being carried on land by a company they are entitled to the protection of the Carriers Act (1 Will. 4, c. 68). This act was, as appears by the preamble, intended to protect carriers from the practice of consignors in sending packages containing valuables without declaring their nature and value, and by this concealment lulling the vigilance of the carrier in taking steps for the protection of the articles according to their nature; and it enacts (sect. 1) that, as to the articles therein enumerated, when their value exceeds 10*l.* the carrier shall not be liable unless their nature and value is declared at the time of delivery for carriage.

Only liable to a specified amount for live stock when not declared.

With respect to live stock carried by railway companies, the legislature, without taking away their liability for loss or injury, has limited the *amount* for which they shall be liable in the case of horses, cattle, sheep and pigs when the customer at the time of delivery for carriage fails to declare their higher values. (17 & 18 Vict. c. 31, s. 7.) All the provisions of this act, which is called the Railway and Canal Traffic Act, 1854, are now extended to traffic carried on by railway companies by means of steam vessels. (31 & 32 Vict. c. 119, s. 16.)

Liability during sea transit, 31 & 32 Vict. c. 119, s. 14.

A yet further limitation as to sea transit has been placed within the power of companies where they undertake the conveyance of goods and live stock, partly by railway and partly by sea. 31 & 32 Vict. c. 119, s. 14, enacts, "that where a company by through booking contracts to carry any animals, luggage, or goods from place to place,

partly by railway and partly by sea, or partly by canal and partly by sea, *a condition* exempting the company from any loss or damage which may arise during the carriage of such animals, luggage or goods by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition."

Sea transit by vessels not belonging to the company.

By 34 & 35 Vict. c. 78, s. 12, it is enacted, that "where a railway company, under a contract for carrying persons, animals or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages in respect of loss of life or personal injury, or in respect of loss of, or damage to, animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company; provided that such loss of life or personal injury, or loss or damage to animals or goods, happens to the person, animals or goods (as the case may be) during the carriage of the same in such vessel, the proof to the contrary to

lie upon the railway company." This act operates to extend all the provisions of the Railway and Canal Traffic Act, 1854, to companies in respect of their carrying goods and live stock under a contract in steam vessels not belonging to them. (*Doolan* v. *Midland Rail. Co.*, L. R., 2 H. L. 792; 25 W. R. 882.)

Liability limited by signed special contract.

In addition to the limitations expressly conferred by statute, railway companies may limit their liability by special contracts or conditions. (17 & 18 Vict. c. 31, s. 7.) But such contracts must be just and reasonable in their terms, and must be in writing signed by the owner or person delivering the goods to the company. (*Peek* v. *North Staffordshire Rail. Co.*, 32 L. J., Q. B. 241; 10 H. L. C. 473.)

Not by any general notice.

No general notice given by the company, however published, will limit their liability. (*Ib.*) And this applies, whether the transit is performed wholly by land (*ib.*), or partly by sea in vessels belonging to the company (*Cohen* v. *South Eastern Rail. Co.*, 46 L. J., Ex. 417; L. R., 2 Ex. D. 253), or in vessels not belonging to them, but by which they procure the traffic to be carried. (*Doolan* v. *Midland Rail. Co.*, *supra.*) A company cannot by contract relieve themselves from their own wrong, or from responsibility for the negligence or fraud of their own servants. (*Ib.*)

Liability continues to the end of the journey,

The liability of a railway company receiving goods attaches until the goods reach the destination to which they are booked, so that if a company receive goods to be sent to a place beyond their own termini, and to reach the destination the goods have to pass over continuous lines of

railway belonging to other companies, or into the hands of different carriers, the receiving company will be liable on the contract to carry for the whole distance, notwithstanding the loss or injury does not arise on their own line (*Muschamp* v. *Lancaster and Preston Junction Rail. Co.*, 8 M. & W. 421; *Mytton* v. *Midland Rail. Co.*, 28 L. J., Ex. 385; 4 H. & N. 615; *Bristol and Exeter Rail. Co.* v. *Collins*, 29 L. J., Ex. 41; 7 H. L. C. 194); and this, although the destination is a place without the realm. (*Crouch* v. *London and North Western Rail. Co.*, 23 L. J., C. P. 73; 14 C. B. 255.) It makes no difference that the goods are directed by the sender to be sent part of the way by sea, and by a different route to that which would have been adopted if no such direction had been given. (*Wilby* v. *West Cornwall Rail. Co.*, 27 L. J., Ex. 181; 2 H. & N. 703.)

unless company stipulate against liability beyond their own line.

A company may, however, stipulate at the time they receive the goods, that they will not be liable in respect of goods destined beyond the limits of their own line after they have delivered them over to another carrier in the usual course of further conveyance (*Aldridge* v. *Great Western Rail. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582); and such a contract, as not affecting the traffic on the company's own line, will not require to be signed by the sender. But to claim exemption under such a stipulation, it must be shown that the goods passed into the custody of some other carrier who would be responsible before they

were lost or injured. (*Kent* v. *Midland Rail. Co.*, 44 L. J., Q. B. 18; L. R., 10 Q. B. 1.)

The receiving company always the contracting company.

Where a contract is made with one company, to carry over their own and other lines, with a condition against liability for injury arising on another line, and injury does so arise, the latter company cannot be sued upon the contract (*Coxon* v. *Great Western Rail. Co.*, 29 L. J., Ex. 165; 5 H. & N. 274), unless, as has been suggested, where there are circumstances to constitute the companies partners (*ib.*); or where the first company can be shown to be the agent of the other company. (And see *Foulkes* v. *Metropolitan District Rail. Co.*, 28 W. R. 526.)

CHAPTER II.

OBLIGATION OF COMPANIES TO RECEIVE GOODS OFFERED FOR CARRIAGE.

Railway company bound to receive such goods as they usually carry from all persons alike.

As common carriers railway companies are under a legal obligation to receive from all persons and carry all such goods as they are empowered, profess, and have convenience to carry, or are in the habit of taking, tendered to them for conveyance on their usual route, and for which the hire is offered, treating all persons alike *cæteris paribus*, upon the same terms and at like rates (*Crouch* v. *London and North Western Rail. Co.*, 23 L. J., C. P. 73; 14 C. B. 255; *Garton* v. *Bristol and Exeter Rail. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112); and they are liable to an action for refusing to receive for carriage such goods as they are accustomed to carry without special reason for refusing.

But their duty to receive things brought for carriage is regulated by their own will in many respects. They may choose by a public profession the kind of conveyance, the times for transit, the mode of delivery, and the articles to be carried, and the duty to receive is always limited by the convenience to carry. (*McManus* v. *Lancashire and Yorkshire Rail. Co.*, 28 L. J., Ex. 353; 4 H. & N. 327, per Erle, C. J.) A company is not bound to receive for carriage goods which they do not pro-

Only bound to carry according to

their public profession.

fess to the public to carry, or consigned to a station, whether intermediate or terminal, to which they have not been in the habit of carrying the class of goods offered. A carrier may profess to carry light goods only, and then he cannot be compelled to carry heavy goods; or he may say that he will carry from Manchester to London, and not from the intermediate stations, and then he cannot be made to carry goods from those places; but as soon as he has publicly professed to carry in any particular manner, and so long as he does so, he is bound to carry the goods of any one, if he has room in his conveyance, and the price of the carriage be tendered when the goods are offered. (*Johnson* v. *Midland Rail. Co.*, 18 L. J., Ex. 366; 4 Ex. 371, per Parke, B.) And it was accordingly held that, although a company carry coal and other goods for hire from one end of their line to the other, and carry goods other than coal from an intermediate station, they are not bound to carry coal from that station unless they have publicly professed to do so; and even if they have held themselves out as carriers of coal from that station, no action will lie for refusing to carry coal from it, unless it be shown that the company had conveniences at the station for receiving and carrying the coal. (*Johnson* v. *Midland Rail. Co.*, *supra.*) And where a railway company posted up in a particular station a list of tolls, including those taken for coal, it was held not sufficient evidence of their holding themselves out to the public as common carriers of coal from that station. (*Oxlade* v. *North Eastern Rail. Co.*, 9 W. R. 272.) The authority

But quære by the

of these cases has been questioned by the Railway Commissioners, who considered that the common law obligation on railway companies as land carriers to carry only such goods and between such places as they publicly profess to carry, has been extended by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), which requires every railway company according to its powers to afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from its railways (*post*, Chap. III.) And they thought that questions as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a railway company is liable to carry goods of every kind, or for all persons alike, are to be determined in each case, not with reference to what a railway company may choose to do or may ordinarily do, but with reference to what may be within their powers, and at the same time a reasonable requirement. (*Thomas* v. *North Staffordshire Rail. Co.*, 21 Sol. Jour. 183.)

Railway Commissioners.

If a company have have been in the habit of carrying a particular class of goods by a certain train only, although such train should be run but once a day or once a week, they cannot be compelled to receive such goods for carriage by any other train; but where a railway company received cattle for carriage, and it did not appear that there were any ordinary cattle trains on the line, it was held to be properly left to the jury to say what was a reasonable time within which to carry them, and therefore whether the company were bound to send the cattle by special train. (*Donohoe* v.

Not bound to receive except for usual train for class of goods,

London and North Western Rail. Co., 15 W. R. 792.)

and a reasonable time before dispatch of train.

Companies are entitled to a reasonable time for the loading of carriages and marshalling them into trains, and would be entitled to refuse to receive goods unless offered for carriage a reasonable time before the hour at which the train is to be dispatched. (*Palmer* v. *London and South Western Rail. Co.*, 35 L. J., C. P. 289; L. R., 1 C. P. 588, per Erle, C. J.; *Garton* v. *Bristol and Exeter Rail. Co.*, 28 L. J., C. P. 306, per Williams, J.) On the other hand, a company is not to be improperly embarrassed by the unduly lengthened custody of traffic requiring more than ordinary care, such as cattle, and they may refuse to receive such traffic an unreasonable time before they are ready to dispatch in ordinary course a train embracing that particular class of traffic. (See *Lane* v. *Cotton*, 1 Ld. Raym. 652.)

Insufficient number of carriages.

A common carrier is not bound to supply more carts than he is in the habit of employing because more goods are tendered than usual. (*Johnson* v. *Midland Rail. Co.*, 18 L. J., C. P. 368, per Parke, B.) But, as regards railway companies, this must, it is suggested, be received with some qualification. If the pressure of traffic is such as the company might reasonably have anticipated and provided for, it is assumed they would not be released from the liability to receive goods on the ground of want of convenience. (See *Wallace* v. *Great Southern and Western Rail. Co.*, 17 W. R. 464.)

Defective packing.

It would be too much to say that any defective packing, however slight, would be ground for re-

fusing to receive goods. But such refusal would be justified where the packing is so defective that, looking to the character of the goods and the nature of the journey, their condition will entail upon the company extra care and extra risk. (See *Munster* v. *South Eastern Rail. Co.*, 27 L. J., C. P. 308; 4 C. B., N. S. 676, per Williams, J.; *Hart* v. *Baxendale*, 16 L. T., N. S. 396.)

Payment of carriage.

It will be ground for refusal to receive goods that the customer refuses upon delivery to pay a reasonable price for their carriage. (*Wyld* v. *Pickford*, 8 M. & W. 443; *post*, Chap. V., s. 1.)

Dangerous articles.

Railway companies may refuse dangerous articles, as aquafortis, gunpowder, oil of vitriol, and lucifer matches; and any persons sending such without distinctly marking their nature on the outside of the package, or otherwise giving notice in writing to the book-keeper, or other servant of the company with whom the same is left at the time of sending, shall forfeit to the company 20*l.* for every such offence. (8 & 9 Vict. c. 20, s. 105.) A guilty knowledge, however, on the part of the sender is necessary to render him liable to the penalty; and therefore, where a carrier, who delivered dangerous goods to a railway company, was imposed on by his customer, it was held that the carrier could not be convicted. (*Hearne* v. *Garton*, 28 L. J., M. C. 216; 2 Ell. & Ell. 66.)

Right to open suspected parcels.

The company may require parcels suspected to contain goods of a dangerous nature to be opened to ascertain the fact.

Explosives.

By 38 Vict. c. 17, railway companies may make bye-laws for regulating or prohibiting or subject-

ing to conditions and restrictions the conveyance of gunpowder and other explosives over their line of railway. (Sects. 3, 35, 39.)

Dangerous nature to be distinctly stated.

If the customer in sending dangerous articles does not take reasonable care to have the dangerous nature distinctly communicated to the company or their servants, he will be liable for damages caused by it; as where a person sent a carboy of *nitric acid*, merely informing the carrier that it was *acid*. (*Farrant* v. *Barnes*, 31 L. J., C. P. 137; 11 C. B., N. S. 553.)

No general right to open all parcels.

The right of the company to have parcels opened only extends to those suspected to contain dangerous articles; they have no general right in all cases under all circumstances to require to be informed of the contents of packages tendered to be carried. (*Crouch* v. *London and North Western Rail. Co.*, 23 L. J., C. P. 73; 14 C. B. 255.)

"Packed parcels."

A railway company is bound to receive "packed parcels" from other carriers, and charge for them at the same rate as similar goods of other persons. (*Crouch* v. *Great Northern Rail. Co.*, 23 L. J., Ex. 148; 9 Ex. 556.)

CHAPTER III.

REASONABLE FACILITIES AND UNDUE PREFERENCE.

In addition to the common law liability imposed upon railway companies to receive goods from all persons alike without making any personal distinctions, it is provided by sect. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), as follows:—

"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, *afford all reasonable facilities* for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles; *and no company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever*, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or

17 & 18 Vict. c. 31, s. 2.

canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf." (Explained and amended by 36 & 37 Vict. c. 48, s. 11, *infra*, p. 38.)

Sect. 3 enables parties complaining of any undue preference or other act in contravention of sect. 2, on the part of a company, to apply and obtain from the Court of Common Pleas an injunction restraining the company from continuing so to act.

Jurisdiction of railway commissioners.

By 36 & 37 Vict. c. 48, s. 4, her Majesty was empowered to appoint three railway commissioners, and by sect. 6, any person complaining of anything done, or of any omission made in violation or contravention of sect. 2 of the Railway and Canal Traffic Act, 1854, or of sect. 16 of the Regulation of Railways Act, 1868, or of that act, may apply to the commissioners, who shall have and may exercise all the jurisdiction conferred by sect. 3 of the Railway and Canal Traffic Act,

1854, on the several courts and judges empowered to hear and determine complaints under that act. This act is continued in force by 42 & 43 Vict. c. 57.

The act gives no appeal from the decision of the commissioners, except in the form of a special case upon some question of law (sect. 26). But an order of the commissioners may be restrained by prohibition of the High Court of Justice (*South Eastern Rail. Co.* v. *Railway Commissioners*, L. R., 5 Q. B. D. 217; 28 W. R. 464); and this is the proper mode of calling in question any order they may make. (*Toomer* v. *London, Chatham, and Dover Rail. Co.*, 47 L. J., Ex. 276; L. R., 2 Ex. D. 450.)

The meaning and scope of 17 & 18 Vict. c. 31, s. 2.

The jurisdiction conferred by the second section of the Railway and Canal Traffic Act, 1854, is certainly very wide, but the language employed is not very explicit, and the exercise of the jurisdiction was from the commencement considered as attended with much difficulty. (Per Cleasby, B., *Toomer* v. *London, Chatham, and Dover Rail. Co.*, *supra*.) The act seems to confer jurisdiction to deal with three classes of evils, viz.: (1) want of reasonable facilities in receiving and forwarding traffic; (2) undue preference; and (3) the inharmonious working of different companies with respect to continuous traffic. The language and scope of the act has recently undergone a full and elaborate examination in the case of *South Eastern Rail. Co.* v. *Railway Commissioners* (41 L. T., N. S. 760; 28 W. R. 464.) In this case Cockburn, C. J., said: "The act does not, as remedial statutes generally do, recite the mischief against which its

enactments are directed. In the absence of any express declaration of its purpose, what the act was intended to remedy must therefore be sought in its provisions; and these we find to relate to unreasonable delay or obstruction in the working of the traffic, to undue preference, and to the want of harmonious co-operation between different companies with respect to continuous communication."

Reasonable facilities,

The clause as to "affording reasonable facilities" is in itself wide enough to give authority to interfere even with the construction of the railway, and to direct the providing of new or improved structural accommodations. This view of its scope seems to have been adopted by the judges in the case of *Caterham Rail. Co.* v. *London and Brighton Rail. Co.* (26 L. J., C. P. 161; 1 C. B., N. S. 410,) in granting a rule *nisi*, which however was never drawn up. This view was also acted upon by the Railway Commissioners in several cases, and ultimately, in a case in which they issued an order directing a company to execute certain structural works in respect of their railway, amongst others, to extend the limits of stations, to widen a bridge so as to admit of two instead of one double set of lines, to increase existing platforms and yards, to cover with roofs certain platforms and yards, &c., the matter came before the Queen's Bench Division upon a prohibition, and it was held by Cockburn, C. J., and Manisty, J. (*dissentiente* Lush, J.), that the section gave no power to make such an order (*South Eastern Rail. Co.* v. *Railway Commissioners*, L. R., 5 Q. B. D. 217; 28 W. R. 464); that the act did not justify interference with the structural accommodation of railways, so that when

the traffic increases beyond what was originally contemplated, to compel the erection of new accommodation, but merely gave power to compel a railway company to so use and manage its stations and works, and so conduct its business as to afford accommodation reasonably to be expected of it with the means at its disposal, for receiving, forwarding, and delivering traffic; and per Cockburn, C. J., possibly even to the extent of determining the number of trains to be run, or the times of departure, or the like.

public inconvenience to be shown.

To induce the interference of the Court on a question of "reasonable facilities," it is necessary to show a public inconvenience, and not merely an individual grievance. (*Barret* v. *Great Northern Rail. Co.*, 26 L. J., C. P. 83; 1 C. B., N. S. 423; *Beadell* v. *Eastern Counties Rail. Co.*, 26 L. J., C. P. 250; 2 C. B., N. S. 509.)

Undue preference:

It is an undue preference on the part of a company when every person has not the same facilities for forwarding goods that are conceded to particular persons. The following are instances held by the Courts to amount to undue preference:—

facilities in receiving and forwarding goods.

Where a railway company permitted a carrier (who acted as superintendent of their goods traffic) to hold himself out as their agent for the receipt of goods to be carried on their line, and his office as the receiving office of the company, and goods were received by him at that place without requiring the senders to sign conditions which the company required all other carriers who brought goods to their station to sign. (*Baxendale* v. *Bristol and Exeter Rail. Co.*, 11 C. B., N. S. 787.) Where

a company closed their offices at a certain hour, and refused to receive goods tendered to them after, with the proper amount of carriage, while at the same time they continued to receive goods of the same class, prepared in the same manner, from a particular individual. (*Garton* v. *Bristol and Exeter Rail. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112; *Same* v. *Same*, 28 L. J., C. P. 306; 6 C. B., N. S. 639.) Where a company admitted into their stations their own vans with goods to be forwarded that night at a later hour than they admitted those of other persons (*Palmer* v. *London, Brighton and South Coast Rail. Co.*, 40 L. J., C. P. 133; L. R., 6 C. P. 194); and query, whether the railway company would have been justified in giving such preference to themselves to the exclusion of other carriers if it were necessary in order to enable the general public to have the benefit of sending late parcels. (*Ib.*; and see *Palmer* v. *London and South Western Rail. Co.*, 35 L. J., C. P. 289; L. R., 1 C. P. 588.)

Preference in delivering goods.

In the same way a company is guilty of undue preference when they favour any particular person in the delivery of goods. Where a company employed an agent to receive goods arriving at the C. station, and deliver them to the consignees in the town of C., and refused to deliver at the station to carriers who had general written orders from persons in the town authorizing delivery of goods arriving for them, but required written orders specifying the goods, the Court held this to be an undue preference to the company's agent. (*Parkinson* v. *Great Western Rail. Co.*, 40 L. J.,

C. P. 222; L. R., 6 C. P. 554; *Fishbourne* v. *Great Southern and Western Rail. Co.*, 19 Sol. Jour. 859.) In determining questions of preference, regard will be had to the convenience of the public, and the interest and convenience of the company with regard to its general traffic. Where a company was compelled, by the increase of its business, to separate its mineral from its goods traffic at the O. station, and transferred the former to another station, but retained the mineral traffic at O., so far as regarded the coals of the corporation of M., whose gas works were close to the station, and communicated therewith by a siding, so that the traffic could be removed at once, the Railway Commissioners found as facts that it was for the public convenience and benefit that the company should deliver the coals of the corporation at O., as well as convenient for the company, and held that the preference to the corporation was not undue. (*Lees* v. *Lancashire and Yorkshire Rail. Co.*, 18 Sol. Jour. 629.)

Preference for public interest;

In *Cooper* v. *London and South Western Rail. Co.* (27 L. J., C. P. 324; 4 C. B., N. S. 738), the company had been in the habit of unloading all goods and placing them in or near the owners' waggons; and under a new system they declined to unload for C. (whose goods were sent in large quantities and in separate trucks) without extra pay. They continued to unload for P. who sent small quantities, which, being put into trucks with the company's own traffic, *it was convenient to the company* to continue to unload. The Court refused to order the company to unload the com-

for the convenience of the company.

plainant's goods also, his application to the Court being for this, and not for an injunction to desist from unloading P.'s goods, and it was not proved that he had requested the company to remove the cause of complaint. The judges intimated an opinion that had the application been so framed, and a proper request made to the company to *desist from unloading* P.'s goods, they would probably have given relief, especially if the unloading of P.'s goods could be shown to be prejudicial to C.

Coal depot.

In the case of *West* v. *London and North Western Rail. Co.* (39 L. J., C. P. 282; L. R., 5 C. P. 622), two coal dealers, A. and B., were in the habit of sending coal by the R. and S. Railway to L. At other stations on that line the practice of the company seems to have been to apportion a quantity of land near the station amongst those merchants who required it, as wharves or depots for the reception of coal. From the nature of inland coal traffic this wharf or depot accommodation was almost necessary to its being carried on profitably. At L., however, the company allowed A. to hold, subject to a month's notice, as a coal wharf, the whole of the land adjoining the station which they considered they could appropriate to such a purpose. A. had in fact only used part of it, and used it for the purpose of stacking his coal till sold; B. found that unless put on the same footing as A., he could not carry on a coal trade at L., and he therefore applied to the Court to compel the company either to take away A.'s privilege, or to put him in a similar position. The Court, being

equally divided in opinion, the rule dropped. But the ground on which the dissentient judges thought the application ought to be refused was "that it had nothing whatever to do with the conveyance and transport of the coal, or with any facilities or accommodation relating to conveyance and transport," and was therefore not within the statute.

Admission of vehicles within station.

Any arrangement in favour of one class of vehicles entering their station yards over others of the same class, will be an undue preference on the part of the company, where it is shown to occasion public inconvenience, and there is no cause, such as want of space, for the preference. (*Marriott* v. *London and South Western Rail. Co.*, 26 L. J., C. P. 154; 1 C. B., N. S. 499.)

Preferential tariffs.

The question of undue preference has arisen most frequently in connection with the liability of companies, under what is called the "equality clause" contained in 8 & 9 Vict. c. 20, s. 90 (*infra*, Chap. V. s. 1), and similar clauses in the special acts of the companies, by which it is provided, that the tolls "shall be charged equally to all persons, and after the same rate, whether per ton or mile, or otherwise, in respect of all goods of the same description passing over the same portion of the same line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person using the railway."

Meaning of the equality clause.

The question, what is the meaning of the equality clause when it speaks of things of a "like description" conveyed under "the like circum-

stances," ought to be answered by saying that things are of the "like description" when they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under "like circumstances" where the labour, risk and expense are in the opinion of the jury the same, otherwise not. (*Great Western Rail. Co.* v. *Sutton*, 38 L. J., Ex. 177; L. R., 4 H. L. C. 226, per Willes, J.) So that, in order that the charges may differ, there must be a difference of services rendered, or of circumstances in respect of the passage of the goods over the rails. (*Eversheed* v. *London and North Western Rail. Co.*, 48 L. J., Q. B. 22.; *S. C. sub nom. London and North Western Rail. Co.* v. *Eversheed*, L. R., 3 App. Ca. 1029.)

Examples of preference,

The following are the chief cases dealing with preferential tariffs, which have been decided to amount to undue preference.

to favour a customer in competition with other traders;

In *Ransome* v. *Eastern Counties Rail. Co.* (26 L. J., C. P. 91; 1 C. B., N. S. 437), a company had made an agreement with A. to carry for him coals during three years, from Peterborough to various places on their lines of railway at certain rates; B., a coal merchant at Ipswich, sent coals (which had been brought to that port by sea) to various places on the same lines of railway, and the company charged him a much larger sum per ton in proportion to the distance over which the coals were carried than they charged to A.; *the professed object* of the difference being to enable A., whose coals came to Peterborough by railway, to compete in the coal trade of the district with B., who had the advantage of having his coals brought

to Ipswich by sea. It was held an undue preference; though it was laid down that in determining whether a company has given "any undue and unreasonable preference," *the Courts may take into consideration the fair interests of the railway itself*, and entertain such questions as whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile, than smaller quantities or for shorter distances, so as to derive equal profit to itself.

to introduce a particular traffic into a district;

In *Oxlade* v. *North Eastern Rail. Co.* (26 L. J., C. P. 129; 1 C. B., N. S. 454), a railway company, *from a desire to introduce northern coal and coke* into Staffordshire, were induced to make special agreements with certain merchants for the carriage of coal and coke at a lower rate than their ordinary charge, it was held that this was not a legitimate ground for making such agreements, and that lowering their rate for that purpose, *there being nothing to show that the pecuniary interests of the company were affected*, was giving an undue preference.

to buy off a rival scheme;

In *Harris* v. *Cockermouth, &c. Rail. Co.* (27 L. J., C. P. 162; 3 C. B., N. S. 693), carrying coals from a colliery along a railway at a lower rate of charges than coals from other coal pits in the same locality, in consequence of a threat from the owner of the colliery to construct another railway by which the traffic would have been diverted if the railway company had not consented to carry at such lower rate, was held an undue preference by the company.

to deprive one cus-

So it was held an undue preference where a

tomer of the natural advantages of his situation;

company made a scale of charges for the carriage of coals from P. and I. respectively to various places, the effect of which was to diminish the natural advantages which the I. dealers possessed over those of P.—from their greater proximity to those places—by annihilating (in point of expense of carriage), in favour of the latter, a portion of the distance between P. and those places. (*Ransome* v. *Eastern Counties Rail. Co.*, 27 L. J., C. P. 166; 4 C. B., N. S. 135.)

to enable the company to compete with other carriers;

In *Evershed* v. *London and North Western Rail. Co.* (48 L. J., Q. B. 22; L. R., 3 App. Ca. 1029), the premises of three firms of brewers were connected by sidings with the M. railway, but not with the L. railway, and the L. railway, in order to obtain traffic which would otherwise be conveyed by the M. railway, carted the goods of those three firms gratuitously to and from their station, and also allowed them a rebate of 9*d.* per ton in respect of terminal charges. Other firms not so connected with the M. railway were charged 1*s.* per ton for cartage, and allowed no rebate, and it was held an undue preference. And so where a company, in order to compete with sea carriers, charged a less tonnage rate to persons within a six miles radius of a certain port than to those beyond that radius. (*Budd* v. *London and North Western Rail. Co.*, 25 W. R. 752; 36 L. T., N. S. 802.)

to person engaging to use other lines of the company;

If the goods are the same in quantity and quality, in the cost of receiving and carriage, and in the profit which is thereby made, it is unreasonable to charge more or less for the same service according as the customer of the railway

thinks proper, or not to bind himself to employ them in totally distinct transactions. (Per Willes, J., in *Baxendale* v. *Great Western Rail. Co.*, 28 L. J., C. P. 69; 5 C. B., N. S. 309—Bristol case.) In that case a preference was given to a customer who engaged to employ other lines of railway distinct from, and unconnected with that, in respect of which such preference was granted. (And see *Diphwys Casson Slate Co.* v. *Festiniog Rail. Co.*, 32 L. T., N. S. 271; *Bellsdyke Coal Co.* v. *British Rail. Co.*, 33 L. T., N. S. 29.)

to persons employing company's agent;

Where a company, possessed of a line from B. to C., advertised to convey goods from A. to C. in conjunction with another company, at the rate of 50*s.* per ton, *provided they were consigned by and to their own agent* at those respective places, but if consigned through any one else they charged 2*s.* 6*d.* per ton more, it was held an undue preference. (*Baxendale* v. *North Devon Rail. Co.*, 3 C. B., N. S. 324.)

to company itself in a separate trade;

A company may not give an undue preference even to itself in respect of a trade independent of the railway. In *Baxendale* v. *Great Western Rail. Co.* (28 L. J., C. P. 81; 5 C. B., N. S. 336—Reading case), a railway company formerly charged a uniform rate of 3*s.* 6*d.* per ton on all goods conveyed on their line between R. and P. The goods were collected and delivered both by the company and by B. at a charge of 4*s.* 10*d.* per ton. The company, who had power under their acts to impose their own rates of charge for carrying, but no power to impose tolls for collecting and delivering, raised the charge for carrying to 8*s.* 4*d.*, being the

aggregate of the above charges, with an intimation to the public that they would collect and deliver goods free of all charge. The real purpose of this arrangement was to compel persons desiring to have their goods conveyed by the railway to employ the company to collect and deliver such goods, and thus to secure this business and the profits upon it, as well as to exclude B. from competing with them in this department of business. It was held that this arrangement was an undue preference to the company in their separate capacity of carriers other than on the line of railway, and also an undue prejudice to B.

The ground of decision was, that where a company carries on some other business, they must in respect of such business be taken to be *quoad* the railway in the position of third parties; (and see *Garton* v. *Great Western Rail. Co.*, 28 L. J., C. P. 158; 5 C. B., N. S. 669; *Baxendale* v. *Great Western Rail. Co.*, 33 L. J., C. P. 197; 16 C. B., N. S. 137.)

But in *Baxendale* v. *South Western Rail. Co.* (35 L. J., Ex. 108; L. R., 1 Ex. 37), where the facts were these: the defendants were in the habit of carrying goods from London to the Isle of Wight, by their own railway from London to Southampton, and thence by tramway and steamer; the plaintiffs also carried from and to the same points, using the defendants' line from London to Southampton, and thence by carts and steamer; the plaintiffs claimed to have their goods carried by the defendants from London to Southampton at a sum equivalent to the defen-

dants' through charge from London to the Isle of Wight, less a fair charge for collection in London, and for carrying from Southampton station to the Isle of Wight: it was held they were not entitled to this; the delivery by the defendants beyond the limits of their line not being a delivery auxiliary to their business as carriers on their own line, and therefore differing from a case of delivery in the immediate neighbourhood of a station.

Railway companies are bound to treat common carriers the same as other customers for all purposes, including the mode of charging in the aggregate. Usually, a company is bound to charge a tonnage rate for parcels above a certain weight, with power to charge a greater rate for parcels below the prescribed weight. Questions have arisen upon this as to the power of companies to charge carriers sending "packed parcels;" that is, parcels separately below but aggregately above the weight entitling them to be charged a tonnage rate. It has been decided with respect to such parcels that if they are in a common envelope, they are to be charged at the tonnage rate, and if there are loose parcels, directed by a common direction, from one consignor to one consignee, that is sufficient to subject them to the smaller charge and nothing more; but if the parcels delivered at the same time are directed to different persons, although consigned to one person, it has been held that they may be charged for separately. (*Baxendale* v. *Eastern Counties Rail. Co.*, 27 L. J., C. P. 137; 4 C. B., N. S. 63.) In this case, however, the Court seems to have proceeded upon the ground that the parcels had

Packed parcels.

no marks upon the face of them showing they were destined to one common consignee (per Williams, J.), and that therefore the number of different directions imposed additional trouble on the company. In a later case, however, where each parcel comprised in any consignment was distinctly labelled with a label showing that the carrier was the consignee, although each parcel was also labelled with the address of the person to whom it was ultimately to be delivered, it was held that the company were not entitled to charge for each parcel separately, but only after a tonnage rate, the same as was done when several parcels were included in one consignment to the same consignee, simply without any other addresses. (*Baxendale* v. *South Western Rail. Co.*, 35 L. J., Ex. 108; L. R., 1 Ex. 37.)

Where a company are entitled under their tariff to charge a higher rate for "packed parcels," they cannot charge one carrier after that rate if they do not charge the same to all tradesmen sending exactly the same class of goods. (*Great Western Rail. Co.* v. *Sutton*, 38 L. J., Ex. 177; L. R., 4 H. L. C. 226.)

Customer paying excess may recover it by action.

If a company infringe the equality clause, and give an undue preference to particular customers, a customer paying the excess may recover it in an action against the company. (*Great Western Rail. Co.* v. *Sutton, supra; Evershed* v. *London and North Western Rail. Co.*, 48 L. J., Q. B. 22; L. R., 3 App. Ca. 1029.)

Apparent preference ground for application to the court.

Whenever there has been an apparent preference in respect of the conveyance of goods conceded by a railway company to certain persons to the pre-

judice of a complainant, there is sufficient ground to call upon the company for an explanation and justification of their conduct in the matter. (*Garton* v. *Bristol and Exeter Rail. Co.*, 28 L. J., C. P. 169; 4 H. & N. 33, per Channell, B.)

Circumstances justifying a preference.

It was however early decided that when the statute speaks of "undue or unreasonable preference or advantage," &c., it implies that there may be advantage to one person or to one class of traffic that would not be within the Act. (*Nicholson* v. *Great Western Rail. Co.*, 28 L. J., C. P. 89; 5 C. B., N. S. 366.) That in considering such questions the Court ought to take into account the fair interests of the railway company (*Ransome* v. *Eastern Counties Rail. Co.*, *ante*, p. 26), and the adequacy of the consideration given to the railway company in return for the advantages afforded to the person preferred (*Nicholson* v. *Great Western Rail. Co.*, *supra*), and the fact whether or not they are willing to afford equal treatment to all persons under the like circumstances (but see *Diphwys Casson Slate Co.* v. *Festiniog Rail. Co.*, 32 L. T., N. S. 271).

A company may regulate charges according to the relative expense to themselves.

Mere inequality of charge does not conclusively show that there is an undue preference. The company may impose a scale of charges on goods of a particular character different from that on goods of another character, or on goods over one part of their line different from what is charged over another part of the same line, without a desire to favour any particular kind of traffic or any particular individual, but influenced only by a consideration of the expense of carriage. And a

company will be justified in carrying goods for one person at a less rate than that at which they carry the same description of goods for another person, if there are circumstances which render the cost to the company of carrying for the former less than the cost of carrying for the latter.

Some instances of bargains giving advantages to customers, but not regarded as amounting to an undue preference, are given below.

Preferences if offered to all allowed in case of large over small consignments,

It is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other person, though that other may not be in a situation to avail himself of it. If a million tons are carried for A. at a certain rate, B. may demand the same rate for the same quantity, though he never will, nor can, avail himself of it because his dealings are too small. (*Evershed* v. *London and North Western Rail. Co.*, 47 L. J., Q. B. 284; L. R., 3 Q. B. D. 135, per Bramwell, L. J.)

in respect of distance,

A company may make a proportionately less charge per ton for goods carried a greater than for goods carried a less distance. (*Strick* v. *Swansea Canal Co.*, 33 L. J., C. P. 240; 16 C. B., N. S. 245; *Foreman* v. *Great Eastern Rail. Co.*, 19 Sol. Jour. 774.)

in consideration of a guarantee of quantity.

It is not an undue preference for a company to carry at a lower rate in consideration *of a guarantee* of large quantities and full train loads at regular periods, provided the real object of the company is greater remunerative profit by the diminished cost of carriage, although the effect is to exclude from the lower rate persons who cannot give the

guarantee. (*Nicholson* v. *Great Western Rail. Co.*, 28 L. J., C. P. 89; 5 C. B., N. S. 366; *Greenop* v. *South Eastern Rail. Co.*, 20 Sol. Jour. 830.)

The scale must be relatively fair.

It may happen that a scale of charges and other terms and conditions are so arranged for short distances, small quantities, &c., as to be excessive, unfair, and unreasonable as *compared* with the terms granted for large quantities, long distances, etc.; and had this point been raised in the case of *Nicholson* v. *Great Western Rail. Co.* (*supra*), the Court intimated that it would have felt bound to submit these matters to a detailed investigation by an engineer or traffic manager of a railway, who would be able by calculation to arrive at a satisfactory result upon the principles recognized by railway companies of obtaining the greatest quantity of work from an engine, plant, and staff, at the least expense. In other words, the Court, whilst recognizing the principle that the cost of carriage to the company being less in some cases than others, and other circumstances, may be grounds for graduated and varying charges, has indicated that it is prepared to ascertain that even the varying scales and terms are *relatively* fair and reasonable, so that even those who cannot guarantee the most favourable terms may not be charged more than proportionately higher rates.

Adjustment of districts.

For the convenience of their traffic, companies are obliged to divide their area into districts, with distinct rates and arrangements applicable to each; yet if such districts are arranged for the convenience of the company and not to give any preference or partiality, the Court will not inter-

fere. Thus, where a railway company had created districts in which they carried coals at reduced rates for quantities not less than full train loads of 200 tons, and so adjusted those districts that the places where the complainants the I. dealers traded were distributed into three districts; in each of which the traffic was, in consequence of such division, insufficient to enable them to send the required quantity, and avail themselves of the lower rates. The I. dealers alleged that in order to take advantage of the reduced rate, they would necessarily (in consequence of the parts to which they traded having been put into three districts) have to send three separate full train loads from I., whereas the districts were so arranged that dealers from P. had the places in which they dealt all in one district. The traffic manager swore that these districts were arranged solely with a regard to consumption, and not with any view of preference, and the complainants did not fully and clearly show that the districts could otherwise have been arranged, nor clearly establish a case of undue preference. (*Ransome* v. *Eastern Counties Rail. Co.*, 27 L. J., C. P. 166; 4 C. B., N. S. 135.) The company afterwards charged the reduced rates for the carriage of coals consigned by dealers at P. in the prescribed quantities of thirty-five trucks for one such district, though not carried by the company in one train all the way, the company for their own convenience, in consequence of steep gradients which would otherwise have required extra steam power, detaching at C. some of the trucks from the train and sending them on

afterwards by the ordinary goods or other trains, to which they might be advantageously attached. None of the coals were ever left at C. for consumption there, but were all carried to the district to which they had been so consigned. It was held that by so doing the company had not given an undue preference to the consignors at P., since the tariff being valid, it was immaterial how the company carried coals most conveniently to themselves, provided the tariff was not infringed. (*Same* v. *Same*, 29 L. J., C. P. 329; 8 C. B., N. S. 709.)

Where a company have districts for through rates extending over long distances, they are not bound to vary the rates in respect of slight distances. (*Lloyd* v. *Northampton and Banbury Rail. Co.*, 23 Sol. Jour. 623.)

General principles of the cases.

On reviewing the cases the following general principles seem to have been established for the future guidance of the Courts in deciding questions of undue preference:—

1. That the fair interests of the railway itself are entitled to consideration; but this must be understood as confined to interests in their capacity of railway proprietors, and over that part of the line in regard to which the complaint is made, and not extended to their interests in distinct capacities, or in undertakings in regard to which they virtually stand in the relation of third parties.

2. That due regard must be had to the circumstances which cause the trouble or expense of carrying to the company for one party, or in one case or set of circumstances, to be greater than in another, provided *perfect fairness* be shown by

the company in dealing with such differences. Hence due attention will be paid by the Court to reasons for preferential dues arising out of long distances, large quantities, wholesale dealings with the company, and generally any other things which reduce the trouble and cost of carrying for one party as compared with another.

3. That preferences are unjust which are given for considerations wholly irrespective of circumstances which could make the inconvenience and expenditure for carrying the preferred party's goods less than for others; so that preferences given to compete with other carriers, or to keep out competing lines which the preferred person threatens to promote, or to induce such person to employ the company on other lines or undertakings which they have in hand, or otherwise to benefit the company irrespective of the dues for carrying, have met with no favour from the Court.

4. That preferential tariffs to deprive persons or localities of the natural advantages of their position—as to enable sea-borne to compete with land-borne coals, to encourage the merchandize of a remote place, or of dealers at a distance—are unreasonable.

Continuous traffic.

The third evil with which the second section of the Railway and Canal Traffic Act, 1854, was intended to deal is the inharmonious working of different companies with respect to continuous traffic. This branch of the section was explained and amended by 36 & 37 Vict. c. 48, s. 11, which enacted, that—"Subject as hereafter mentioned, the said facilities to be so afforded are hereby declared

to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates). Provided as follows:—(1) The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded: (2) Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice inform the company requiring the traffic to be forwarded whether they agree to the rate and route; and if they object to either, the grounds of the objection:" and provision is made, in the case of any objection, that it shall be referred to the Railway Commissioners for decision. (See the Act, in the Appendix.)

Jurisdiction of Commissioners to regulate continuous traffic.

The Commissioners have no power to make an order which would override an Act of Parliament. Thus, where it was enacted by a special Act that, in consideration of a guarantee by a railway company of a dividend on the capital of a canal company, the canal company should not reduce the rates for the time being payable on the canal without the consent of the railway company, it was held that the Commissioners had no power without the consent of the railway company, and without the

railway company being before them, to make an order establishing a through rate over that and other canals, and reducing the rates payable on that canal and others. (*Warwick and Birmingham Canal Co.* v. *Birminghan Canal Co.*, 48 L. J., Ex. 550; 40 L. T., N. S. 846.)

The Commissioners have no power to make an order on two railway companies to afford to the public facilities for conveyance by doing jointly acts which neither company could do separately (*Toomer* v. *London, Chatham and Dover Rail. Co.*, 47 L. J., Ex. 276; L. R., 2 Ex. D. 450); and they will only interfere if a case of public inconvenience is shown. (*Barret* v. *Great Northern Rail Co.*, 26 L. J., C. P. 83.) The obligation of a company to afford reasonable facilities for receiving and forwarding by its railway traffic coming by another railway which forms with it a continuous line of communication, is not limited to the cases in which a railway company has accommodation to take over such traffic at the point of junction. (*Victoria Coal and Iron Co.* v. *Neath and Brecon, &c. Rail. Co.*, 21 Sol. Jour. 822.)

CHAPTER IV.

COMMENCEMENT OF A RAILWAY COMPANY'S LIABILITY.

SECT. 1.—*Delivery to the Company.*

Liability attaches on delivery,

A RAILWAY company's liability as carriers attaches immediately upon the delivery of the goods to them for the purpose of carriage, and with the destination communicated to them. The company undertake not merely to carry goods, but they must receive and deliver them. They may or may not receive and deliver at the edge of their rails; but be that as it may, from the time they receive them they are carriers of them. Under certain circumstances they do not receive them at the edge of their rails but before. Sometimes they collect at receiving houses, or sometimes at the houses of the consignors; but from the moment of their receipt they are liable as carriers. (*Evershed* v. *London and North Western Rail. Co.*, 47 L. J., Q. B. 284; L. R., 3 Q. B. D. 134; per Brett, L. J.)

wherever the company may receive the goods.

Actual delivery necessary.

To render the company liable, however, there must be an actual delivery to them or to some servant, agent, or other person authorized or placed by them in a position to hold himself out to the public as authorized to act on their behalf for this

purpose (Story, Bail. s. 532), and the goods must be placed under their control. (*Bergheim* v. *Great Eastern Rail. Co.*, 47 L. J., C. P. 318; L. R., 3 C. P. D. 22.)

Delivery may be to servants and agents of the company,

It is the duty of a railway company to have servants capable of giving directions and of dealing with everything that the exigency of the traffic may require (*Taff Vale Rail. Co.* v. *Giles*, 23 L. J., Q. B. 43; 2 E. & B. 823); and their servants acting in the ordinary scope of their employment would have authority to receive goods and enter into contracts as to the forwarding of them. (*Long* v. *Horne*, 1 C. & P. 610; *Winkfield* v. *Packington*, 2 C. & P. 599.)

As a rule the officials at a railway station (*Pickford* v. *Grand Junction Rail. Co.*, 12 M. & W. 766; *Wilson* v. *York and Newcastle Rail. Co.*, 17 L. T. 223), the company's draymen, where such are employed to collect or usually collect goods on the road or at the houses of the consignors (*Davey* v. *Mason*, Car. & M. 45; *Baxendale* v. *Hart*, 21 L. J., Ex. 123; 6 Ex. 769), the servants of another carrier engaged by the company under a sub-contract to deliver and collect goods (*Machin* v. *London and South Western Rail. Co.*, 17 L. J., Ex. 271; 2 Ex. 415), a person accustomed to book for the company, although the servant of, and deriving his authority from another and separate carrier who undertakes the transit during a stage of the journey anterior to the goods actually coming into the company's possession (*M'Court* v. *London and North Western Rail. Co.*, 3 Ir. R. C. L. 107, 402), would be considered persons to whom a good delivery might be made, and who would be com-

who may contract for carriage,

petent to enter into a contract, ordinary or special, for the carriage of the goods.

but only when acting within scope of their authority,

But a servant could not bind the company beyond the authority presumed from his employment (*Great Western Rail. Co.* v. *Willis*, 34 L. J., C. P. 195; 18 C. B., N. S. 748; *Horn* v. *Midland Rail. Co.*, 42 L. J., C. P. 59; L. R., 8 C. P. 131; per Blackburn, J.); nor even to the extent of the authority presumable from his employment, if the customer have notice of a more limited authority (*Walker* v. *York and North Midland Rail. Co.*, 23 L. J., Q. B. 73; 2 E. & B. 750); nor when acting in contravention of his duty, as where an agent whose duty was to give receipts for goods actually received, fraudulently gave a receipt for goods which had never been received (*Coleman* v. *Riches*, 24 L. J., C. P. 125; 16 C. B. 104); nor when acting in defiance of the known course of business of the company, as where a company notified that they would not carry cattle unless they were delivered to a porter, who after counting them, gave to the person delivering them a consignment note signed by both the person delivering and the porter, and this consignment note contained a notice that the company would not be liable for articles unless they were signed for by their servants; it was held, that a porter had no authority to receive cattle and contract for their carriage except in the usual manner, and that where he did so, the company were not liable for the loss of cattle so received from persons acquainted with the notice and usual course of business. (*Slim* v. *Great Northern Rail. Co.*, 23 L. J., C. P. 166; 14 C. B. 647; and see *Belfast and Ballymena Rail. Co.* v.

Keys, 9 H. L. C. 556.) If servants of the company act beyond the scope of their ordinary business, in order to bind the company, it must be shown that they are acting under a special authority from the company, that is, the board of directors. (*Taff Vale Rail. Co.* v. *Giles*, 23 L. J., Q. B. 43, per Parke, B.)

or when specially authorized.

If, however, an agent has general authority to receive goods and contract for carrying them, this general authority cannot be restricted by special instructions of which the customer is ignorant. (*Page* v. *London and North Western Rail. Co.*, 16 W. R. 566.)

General authority not restricted by secret instructions.

The acquiescence of the company is necessary to a delivery. It is no delivery if the goods are merely left at their booking office (*Selway* v. *Holloway*, 1 Ld. Raym. 46), or placed on one of their vehicles, without the knowledge or consent of them or their servants. (*Lovett* v. *Hobbs*, 2 Show. 127; *Leigh* v. *Smith*, 1 C. & P. 640.)

Knowledge and consent of company necessary to a delivery.

The delivery must be for the purpose of being carried in due course. If the company receive goods into their warehouse to be forwarded according to the future orders of the owners, and the goods are lost by fire before such orders are received or the goods are put in transit, they are not liable as common carriers but as warehousemen. (Story, Bail. s. 537.)

Delivery must be for immediate transit and not for warehousing,

If, however, the company receive goods into their warehouse for the accommodation of themselves and their customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, the liability begins with the receipt of the goods. (Story, Bail. s. 536.)

unless warehoused as accessory to the carriage.

And if the goods are of a description which the company only carry by particular trains and at certain intervals, and they are brought to the receiving house before the company are ready to carry, if the company receive them, though it be to warehouse until they can be put in transit, it will be such a delivery to them for the purposes of immediate carriage as to make them liable as common carriers for any loss which may happen before the transit actually commences. (*Moffat* v. *Great Western Rail. Co.*, 15 L. T., N. S. 630.)

Goods need not be entered on a way bill.

It is not necessary to constitute a delivery that the goods should be entered on any way bill or freight list, this being a mere *ex parte* document, and is not like a bill of lading, a contract between the parties. (Chitty & Temple, on Carriers, 30.)

Sect. 2.—*The Carriers' Act.*

General liability of company limited by Carriers' Act.

Although railway companies are liable as common carriers for goods generally, there are certain special classes of goods for which, under the Carriers' Act, they only incur the common law liability as insurers, when the proper steps are taken by the person delivering the goods to attach this liability. It is unnecessary to consider the historical development of the law anterior to, and which led to the passing of, this Act. (See Addison, Contracts, 756, 7th ed.; Chitty & Temple, 44.)

Not liable for loss, &c. of specified articles

By 1 Will. 4, c. 68, commonly called "The Carriers' Act," after a recital of the evils to be remedied, it is enacted, by sect. 1, that from and after

above 10*l.* in value, unless nature and value declared at time of delivery.

the passing of the Act no common carrier *by land*, for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following, that is to say:—

Gold or silver coin of this realm or of any foreign state;

Gold or silver in a manufactured or unmanufactured state;

Precious stones;

Jewellery:

Watches, clocks, or time-pieces of any description; (this would include a ship's chronometer, *Le Couteur* v. *London and South Western Rail. Co.*, 35 L. J., Q. B. 40; L. R., 1 Q. B. 54.)

Trinkets; (articles the main object of which is ornament, though of some use, are trinkets; even if the main object is to form some part of the dress, if they are intended to be ornamental to the apparel, they are trinkets; and articles only occasionally produced when wanted, though articles of use and necessity (as a purse), yet if, by the superaddition of so much ornament, there is given to them such a character as to make their main object ornament, they are trinkets, *Bernstein* v. *Baxendale*, 28 L. J., C. P. 265; 6 C. B., N. S. 251; thus ornamented portmonnaies and ladies' smelling-bottles, ivory bracelets, ornamental shirt pins, bracelets, rings, brooches, *ibid.*, and ivory fans, *Att.-Gen.* v. *Harley*, 7 L. J., Ch. 31; 5 Russ. 173, are trinkets; but not an eye-glass and gold chain, *Davey* v. *Mason*, Car. & M. 45, nor a plain

unornamented German silver fusee box; or other articles the principal object of which is utility, and whatever ornament they may possess is only accessory to their use, *Bernstein* v. *Baxendale*, *supra*, per Wilde, J.)

Bills; (an accepted bill not signed by the drawer is not within the Act as a "bill," though it might be as a writing, *Stoessiger* v. *South Eastern Rail. Co.*, 23 L. J., Q. B. 293; 3 E. & B. 549.)

Notes of the Governor and Company of the Banks of England, Scotland, and Ireland, respectively, or of any other bank in Great Britain or Ireland;

Orders, notes, or securities for payment of money;

English or foreign stamps;

Maps; (*Wyld* v. *Pickford*, 8 M. & W. 443.)

Writings; (*Pianciani* v. *London and South Western Rail. Co.*, 18 C. B. 226.)

Title deeds;

Paintings; (and artist's pencil sketches, *Mytton* v. *Midland Rail. Co.*, 28 L. J., Ex. 385; 4 H. & N. 615; but they must be articles of artistic value, as paintings, and not mere designs or patterns, *Woodward* v. *London and North Western Rail. Co.*, 47 L. J., Ex. 263; L. R., 3 Ex. D. 121.)

Engravings; (*Boys* v. *Pink*, 8 C. & P. 361.)

Pictures; (and their frames, *Anderson* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 55; *S. C.*, *sub nom. Henderson* v. *Same*, L. R., 5 Ex. 90.)

Gold or silver plate or plated articles;

Glass; (includes looking-glasses, *Owen* v. *Burnett*, 2 Cr. & M. 357; 3 L. J., Ex. 76.)

China;

Silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials; (includes silk hose, *Hart* v. *Baxendale*, 6 Ex. 769; 20 L. J., Ex. 338; elastic silk web, *Brunt* v. *Midland Rail. Co.*, 33 L. J., Ex. 187; 2 H. & C. 889; a truss of silk, *Butt* v. *Great Western Rail. Co.*, 20 L. J., C. P. 241; 11 C. B. 140; and a silk dress made up for wearing, *Flowers* v. *South Eastern Rail. Co.*, 16 L. T., N. S. 329.)

Furs; (does not include hat bodies made partly of fur and partly of wool, *Mayhew* v. *Nelson*, 6 C. & P. 58.)

Lace; (*Treadwin* v. *Great Eastern Rail. Co.*, 37 L. J., C. P. 83; L. R., 3 C. P. 308; but not machine-made lace, 28 & 29 Vict. c. 94.)

Or any of them, contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of 10*l.*, unless at the time of delivery thereof at the office, warehouse or receiving house of such common carrier, or to his or their servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property, shall have been declared by the person or persons sending or delivering the

same, and such increased charge as is thereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Carrier may demand increased charge,

Sect. 2 provides that when such parcel or package shall be so delivered, and its value and contents shall be declared, and such value exceeds 10*l.*, it shall be lawful for the carrier to demand an increased rate of charge, to be notified by a notice affixed in legible characters in some public and conspicuous part of the office or other receiving house where such parcels are received for conveyance, stating the increased rates of charge to be paid over and above the ordinary rate, and all persons sending or delivering parcels are to be bound by such notice without further proof of the same having come to their knowledge.

to be publicly notified;

to give a receipt for increased rate.

Sect. 3 requires that when the value shall have been so declared, and the increased rate paid or agreed to be paid, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the common carrier shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Transit partly by land and

It will be observed that the act applies in terms only to carriers by land, but where a company

partly by sea.

carry partly by land and partly by sea, the act protects them as to loss or injury during the land transit. (*Le Couteur* v. *London and South Western Rail. Co.*, 35 L. J., Q. B. 40; L. R., 1 Q. B. 54; *Pianciani* v. *Same*, 18 C. B. 226.) And if the company carry under a special contract (as they are entitled to do by sect. 6), they are still entitled to the protection of the statute, unless the terms of the contract are inconsistent with the exemption thereby conferred. (*Baxendale* v. *Great Eastern Rail. Co.*, 38 L. J., Q. B. 137; L. R., 4 Q. B. 244.)

What is a parcel or package.

Articles may be said to be "contained in a parcel or package" when contained in one common outer cover or receptacle, or so fastened together as to form one bundle. Thus pictures laid upon one another (without any covering or tie), in the owner's wagon, which had sides but no top, and the wagon was delivered to the company, and by their servants placed on one of their trucks for carriage, it was held to be a "parcel or package" within the act. (*Whaite* v. *Lancashire and Yorkshire Rail. Co.*, 43 L. J., Ex. 47; L. R., 9 Ex. 67.)

Articles within the act a question for jury.

In a case of doubt, the question, whether an article is of one of the descriptions mentioned in the act, is a question of fact for a jury. (*Brunt* v. *Midland Rail. Co.*, 33 L. J., Ex. 187; 2 H. & C. 889; *Woodward* v. *London and North Western Rail. Co.*, 47 L. J., Ex. 263; L. R., 3 Ex. D. 121.)

It is not necessary that any one article in the parcel should be of the value of 10*l.* The com-

pany are protected if articles of the classes mentioned contained in the parcel amount in the aggregate to more than 10*l.* in value. But the company would be liable where a single consignment consists of distinct parcels of goods of the classes specified, separately of less but in the aggregate of greater value than 10*l.*

Contents of a parcel of a mixed character.

If the contents of a parcel or package exceeding 10*l.* in value, and not declared, are of a miscellaneous character, consisting partly of articles within, and partly of articles not within the act, the company is released from all liability in respect of the former, but their common law liability remains the same in respect of the latter (*Bernstein* v. *Baxendale*, 28 L. J., C. P. 265); but if articles not within the act are attached and merely accessory to other articles within the act (as the frame of a picture), the company will not be liable for their loss. (*Anderson* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 55; L. R., 5 Ex. 90.) And if a box or packing case containing only articles within the act be lost, its value cannot be recovered (*Wyld* v. *Pickford*, 8 M. & W. 443); but if it contain articles, some within the act and some not, the value of it, as well as of the articles not within the act, may be recovered. (*Treadwin* v. *Great Eastern Rail. Co.*, 37 L. J., C. P. 83; L. R., 3 C. P. 308.)

Accessories.

"Value" within the act.

"Value" means intrinsic value at the time the parcel is delivered. Thus a bill of exchange for 11*l.* 10*s.*, if it is in an imperfect state, is only a writing of which the value is that of the paper on which it is written. (*Stoessiger* v. *South Eastern*

Rail. Co., 23 L. J., Q. B. 293; 3 E. & B. 549.) If the consignor declares the value of the goods, he is bound by his declaration, and cannot afterwards show that the value of the goods exceeded that declared. (See *M'Cance* v. *London and North Western Rail. Co.*, 34 L. J., Ex. 39; 3 H. & C. 343.) And whatever the declared value the sender must, if the goods are lost, prove their actual value. (Sect. 9.)

Where delivery may be made within the act.

The exemption of the act equally applies whether the goods are delivered at the receiving house of the company or to one of their carmen sent round to collect goods, or to any other agent of the company. (*Baxendale* v. *Hart*, 21 L. J., Ex. 123; 6 Ex. 769; *Behrens* v. *Great Northern Rail. Co.*, 30 L. J., Ex. 153; 31 *ib.* 299; 6 H. & N. 366; 7 *ib.* 950.)

What is "loss" within the act.

"Loss" within the act means total loss of the article itself, and does not apply to protect the company from liability for consequential loss to the consignee by reason of delay in delivering the goods. (*Hearn* v. *London and South Western Rail. Co.*, 24 L. J., Ex. 180; 10 Ex. 793.)

The kind of declaration required.

To constitute a declaration within the act it is necessary to state the specific nature of the articles (*Owen* v. *Burnett*, 2 Cr. & M. 353; 3 L. J., Ex. 76), but not to make an express and formal declaration of their value. (*Bradbury* v. *Sutton*, 19 W. R. 800; 21 *ib.* 128.) It would be sufficient if the sender says—"Take care; these are pictures of the value of 100*l.*," or any other sum (*Behrens* v. *Great Northern Rail. Co.*, 30 L. J., Ex. 158, per Bramwell, B.); and where the defendants' agent signed the plaintiff's delivery book, after himself insert-

ing, at the plaintiff's request, the word "silks" as the description of the goods, this was held a sufficient declaration of their nature, and the plaintiff also said to the defendants' agent, "There are about a 100*l.* worth of goods in the parcel:" this was held a sufficient declaration of their value. (*Bradbury* v. *Sutton*, *supra*.) Where a general statement of value is indefinite the carrier should inquire more particularly. (*Ib.*) But the company would not be liable for their knowledge of the nature and value of a parcel not derived from a declaration of the sender or his agent. (See *Robinson* v. *South Western Rail. Co.*, 34 L. J., C. P. 234.) There must be some declaration made by the sender or his agent. It is not sufficient that the company have a conviction as to the contents of the parcel (*Boys* v. *Pink*, 8 C. & P. 363); nor that its appearance, or something written on it, indicates that it is of value: thus a plaintiff was held not entitled to recover for the loss of a looking-glass, upon the case of which were the words "Plate glass; looking-glass—keep this edge upwards," but no actual declaration was made or increased value paid (*Owen* v. *Burnett*, 2 Cr. & M. 353); so where pictures were so exposed that their nature could be easily seen by the company's servants. (*Morritt* v. *North Eastern Rail. Co.*, 45 L. J., Q. B. 289; L. R., 1 Q. B. D. 302.)

Effect of non-compliance with the act by either sender or carrier.

It will be seen that sect. 1 of the act relates to the duty of the sender of goods; sects. 2 and 3 to that of the carrier, and that the sender's duty is a condition precedent to that of the carrier. It is necessary, therefore, to consider what is the effect of the neglect of either sender or carrier to take

the steps pointed out by the act, and goods within the act are lost or injured. If the sender declare their nature and value, and the carrier has not got the proper notice affixed in his office, he is bound to receive and carry without any extra charge, and is liable as a common carrier. If he has got such a notice affixed he may demand an extra charge according to such notice. If he neglects to demand it, the sender is not bound to tender it, and the carrier receiving the goods becomes liable as at common law. (*Behrens* v. *Great Northern Rail. Co.*, 31 L. J., Ex. 299; 7 H. & N. 950.) So, if he demands it and it is paid; but if he demands it and payment is refused, then he is not liable. Even if the carrier have not the proper notice affixed he is not liable for loss or injury, if the sender does not declare the nature and value of the goods. (*Baxendale* v. *Hart*, 21 L. J., Ex. 123; 6 Ex. 769.)

If the goods are not declared, company not liable for gross negligence.

By the first section the exemption of the carrier is complete, unless the preliminary thereby made indispensable is complied with by the sender of the goods. So that in the absence of a declaration by the customer of the nature and value of the goods the company will not be liable even for loss occasioned by the gross negligence of themselves or their servants (*Hinton* v. *Dibben*, 11 L. J., Q. B. 113; 2 Q. B. 646; *Morritt* v. *North Eastern Rail. Co.*, 45 L. J., Q. B. 289; L. R., 1 Q. B. D. 302), even though the goods are carried beyond their destination and there injured. (*Ib.*) But the company will be liable if they by their acts of misfeasance divest themselves of their character of carriers, as where they wilfully damage the goods

or dispose of them to a third party (*ib.*); or if they omit to forward the goods (*Garnett* v. *Willan*, 5 B. & Ald. 53); or forward them otherwise than agreed upon. (*Sleat* v. *Fagg*, 5 B. & Ald. 342.)

Not protected from felonies by carriers' servants.

It is expressly provided, however, that the statute shall not protect the carrier from liability to answer for any loss arising from the felonious acts of any servants in his employ. (Sect. 8.) It is not necessary, in order to prove the liability of a railway company for loss through the theft of their servants, to give such evidence as would convict one or more of the company's servants. (*Vaughton* v. *London and North Western Rail. Co.*, 43 L. J., Ex. 75; L. R., 9 Ex. 93.) It is sufficient to give evidence which raises a *primâ facie* case that the goods were stolen by some of their servants (*Ib.*); and a policeman may be called to prove instructions received by him from a station master, tending to show that the station master suspected that a particular servant had stolen a parcel. (*Kirkstall Brewery Co.* v. *Furness Rail. Co.*, 43 L. J., Q. B. 142; L. R., 9 Q. B. 468.) But it is not sufficient to show that it is more probable that the loss arose from the felonious act of some servant of the company than by the act of some person not employed by the company. (*M'Queen* v. *Great Western Rail. Co.*, 44 L. J., Q. B. 130; L. R., 10 Q. B. 569; *Turner* v. *Great Western Rail. Co.*, 34 L. T. 22.) If the loss arose through the felony of a servant of the company, the company will be liable notwithstanding they may have been guilty of no negligence. (*Great Western Rail. Co.* v. *Rimell*, 27 L. J., C. P. 201; 18 C. B. 575, explaining *Butt* v. *Great Wes-*

tern Rail. Co., 11 C. B. 140; 20 L. J., C. P. 241.)

Who is a servant of a company.

Every person whom the carrier directly or indirectly employs in the performance of the contract which he has undertaken is his servant within the meaning of the act, whether called servant, agent or sub-contractor. Therefore, where a railway company employs a sub-contractor to convey goods over a certain portion of the journey, such sub-contractor and every person employed by him in the performance of the contract is a servant in the employ of the company. (*Machin* v. *London and South Western Rail. Co.*, 17 L. J., Ex. 271; 2 Ex. 415.) But where goods, within the act, were delivered to a company to be carried and were by them placed in a van for transmission, and a man, representing himself to be in the employ of a sub-contractor of the company, obtained from the company's delivery clerk documents enabling him to take the van away and steal the goods, it was held that the company were not estopped from denying that the thief was their servant, and the Court would not infer that he was. (*Way* v. *Great Eastern Rail. Co.*, 45 L. J., Q. B. 874; L. R., 1 Q. B. D. 692.)

Sect. 3.—*Declaration of Value of Cattle.*

By the introduction of railways a new description of traffic was introduced. Sheep and cattle are now ordinarily carried upon railways; and even horses, by means of which the conveyance of goods was formerly effected, are now themselves the subject of conveyance.

The new risks introduced by the new kind of traffic required that railway companies should be further protected. Accordingly, by sect. 7 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), it was provided as to loss of, or injury done to any horses, cattle or other animals in the receiving, forwarding or delivering thereof, "that no greater damages shall be recovered for the loss of, or for any injury done to any of such animals beyond the sums hereinafter mentioned, that is to say:—

17 & 18 Vict. c. 31, s. 7.

Liability of company for injury to live stock limited, unless real value is declared.

For any horse, 50*l.*;

For any neat cattle, per head, 15*l.*;

For any sheep or pigs, per head, 2*l.*;

unless the person sending or delivering the same to such company shall at *the time of such delivery* have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive, by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed by the Carriers' Act, and shall be binding upon such company in the manner therein mentioned; the proof of the value of such animals and the amount of the injury done thereto shall in all cases lie upon the person claiming compensation for such loss or injury."

Company entitled to extra charge for excess value.

Proof of value to be on person claiming compensation.

It is not compulsory upon the company to give

Not necessary to give

a receipt for extra charge.

a receipt for the increased rate of charge, as is provided for by the third section of the Carriers' Act.

Applies to sea transit.

This section, as well as the other provisions of the same act, is, so far as applicable in cases where the company carries on a communication between any towns or ports by means of steam vessels, extended to the steam vessels and the traffic carried on thereby. (31 & 32 Vict. c. 119, s. 16.)

The act is not confined to losses after the receipt by the company is complete.

It has been decided that the protection of this statute is not confined to neglects and defaults after the relation of carrier and customer has been completely established; and the real value of animals above the statutable amount cannot be recovered unless the declaration is made before the injury happens, though it happens before the receipt by the railway company is complete, and in consequence of the negligence of the company. (*Hodgman* v. *West Midland Rail. Co.*, 33 L. J., Q. B. 233; 35 *ib.* 85; 5 B. & S. 173; 6 *ib.* 560.)

Customer not bound to declare, and pay the extra charge,

If the customer choose to forward animals of greater value than the statutable amounts, without the precaution of declaring their value and paying an extra rate, he can do so, and the company cannot compel him to do otherwise, notwithstanding they have information that the animals are of a much higher value, even though that information be communicated by the customer himself, if there was no intention that it should operate as a declaration within the meaning of the statute. To entitle the company to the increased rate, the declaration must be made with an intention that it should so operate. (*Robinson* v. *London and*

South Western Rail. Co., 34 L. J., C. P. 234; 19 C. B., N. S. 51.) But if the sender declare the horses or other animals to be of less value than the sums mentioned in the statute, he cannot afterwards deny the truth of his declaration, nor show that their real value is greater than that declared. (*M'Cance* v. *London and North Western Rail. Co.*, 34 L. J., Ex. 39; 3 H. & C. 343.)

but bound by the declared value.

If cattle become out of condition during the journey, it amounts to injury within the meaning of the act. (*Allday* v. *Great Western Rail. Co.*, 34 L. J., Q. B. 5; 5 B. & S. 903.)

Loss of condition is "injury."

It is for a jury, and not for a judge, to say whether the percentage charged for the extra value declared is reasonable. (*Harrison* v. *London, Brighton and South Coast Rail. Co.*, 31 L. J., Q. B. 113; 2 B. & S. 122, per Erle, C.J.)

SECT. 4.—*Bye-laws.*

By 8 & 9 Vict. c. 20, s. 108, railway companies are enabled to make bye-laws for (amongst other purposes) regulating the loading or unloading of carriages, and the weights they are to carry, and "for regulating the receipt and delivery of goods and other things which are to be conveyed upon carriages used on the line." And under 26 & 27 Vict. c. 92, s. 32, they may make bye-laws relating to passengers, animals, and goods conveyed in steam vessels belonging to the company. But such bye-laws must not be repugnant to the laws of that part of the United Kingdom where the same are

Power to make bye-laws.

to have effect, or to the provisions of the company's special acts of parliament, or to the common law liabilities or duties of such company as carriers. They must be reduced into writing, and have affixed thereto the common seal of the company, and after being sanctioned by the Board of Trade are to be painted on boards, or printed on paper and pasted on boards and hung up, and affixed in a conspicuous part of every wharf or station belonging to the company, according to the nature or subject matter thereof, so as to give public notice thereof to the parties interested therein or affected thereby. (8 & 9 Vict. c. 20, s. 110.)

Publication.

Such bye-laws, when so confirmed, published, and affixed, shall be binding upon and observed by all parties. For proof of the publication of any such bye-laws, it shall be sufficient to prove that a printed paper or printed board, containing a copy of such bye-laws, was affixed and continued, as directed by the act (sect. 111; *Motteram* v. *Eastern Counties Rail. Co.*, 29 L. J., M. C. 57.)

Bye-laws in contravention of special act of company.

Where a company having power, under its special act, to make bye-laws, made one that "every first-class passenger should be allowed to carry 112 lbs. of luggage free of charge, but that the company would not be responsible for the care of the same unless booked and the carriage thereof paid," the bye-law was held to be void, since it was in contravention of a clause in the same special act, by which the company were to be liable as common carriers, without extra charge, for articles of a certain weight and dimensions. (*Williams* v. *Great Western Rail. Co.*, 10 Ex. 15.)

SECT. 5.—*Special Contracts.*

Ordinary contract.

An ordinary contract for carriage is entered into when the customer simply delivers and the company receive goods consigned to an indicated destination, without any stipulation being made as to what risk the company is to be liable for, and in that case the common law liability of carriers attaches to the company. But when the company attach any conditions to the receipt of goods limiting their liability, a special contract is created.

Special contract.

When a company limit their liability, they must be sued not as common carriers, but on the special contract. (*White* v. *Great Western Rail. Co.*, 26 L. J., C. P. 158; 2 C. B., N. S. 7; *Harris* v. *Midland Rail. Co.*, 25 W. R. 63.) And where there is a contract in writing, it must be proved and put in, or the plaintiff will be non-suited. (*Robinson* v. *Great Western Rail. Co.*, 35 L. J., C. P. 123.)

The special contract generally consists of a consignment note, and although evidence may not be given to contradict the written agreement, it may be given to show a contemporaneous parol contract not inconsistent therewith; thus where the written contract is to carry from A. to B., it may be shown that there was a further verbal contract to continue the carriage from B. to C. (*Malpas* v. *London and South Western Rail. Co.*, 35 L. J., C. P. 166; L. R., 1 C. P. 366.)

The statute law regulating the power of railway companies to enter into special contracts which

limit their liability as common carriers, is contained in the seventh section of the Railway and Canal Traffic Act, 1854, the language of which is confused and cumbrous in the extreme, and has resulted in much conflicting interpretation in the various courts, and before different judges. The section reads as follows:—"Every such company as aforesaid shall be liable for the loss of, or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making *such conditions* with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable. . . . Provided also that no *special contract* between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage: provided also that nothing herein con-

17 & 18 Vict. c. 31, s. 7.

Notices limiting liability of company void.

No special contract binding unless signed.

tained shall alter or affect the rights, privileges, or liabilities of any such company under the Carriers' Act, with respect to articles of the descriptions mentioned in the said act."

Company cannot force a special contract on a customer.

It may be convenient here to mention that a railway company have no power to force upon a customer a contract which limits the liability of the company, if the goods are such as they publicly profess to carry. The customer may refuse to sign such a contract, and insist upon the company taking subject to the liability of common carriers, tendering the proper hire to them. (*Carr* v. *Lancashire and Yorkshire Rail. Co.*, 21 L. J., Ex. 261 ; 7 Ex. 707, per Parke, B.)

We have previously seen that the result of the decisions upon this section, and the subsequent acts extending the same (31 & 32 Vict. c. 119, s. 16 ; and 34 & 35 Vict. c. 78, s. 12), has been to establish—

General notices invalid.

1. That all general notices to limit the liability of a company are ineffectual. (*Ante*, p. 8.)

Contract must be signed,

2. That the company can only limit its common law liability by contracts which are signed by the sender or his agent delivering the goods or live stock to the company. (*Ante*, p. 8.)

must be just and reasonable,

3. Even if the contract is so signed, it is not binding upon the customer unless it is just and reasonable in its terms. (*Ante*, p. 8.)

applies to both land and sea transit,

4. These rules apply whether the transit is by sea or land, in vessels belonging to the company, or in those not belonging to them, but by which they procure the traffic to be carried. (*Ante*, p. 8.)

It has, however, been decided that, as to land

but as to land traffic only applies to company's own line.

transit, the act only applies to traffic on the contracting company's own line, and therefore a contract exempting a company from liability for loss on a railway not belonging to or worked by them need not be in writing or signed by the customer, and the company will be protected by the condition having been personally communicated to the customer. (*Zunz* v. *South Eastern Rail. Co.*, L. R., 4 Q. B. 539; 38 L. J., Q. B. 209.)

Unsigned contract binding on the company.

It has further been decided that the act only applies where the company are seeking to exempt themselves from liability by reason of there being a special contract, and therefore a special contract is binding upon the company though not signed by the customer. (*Baxendale* v. *Great Eastern Rail. Co.*, 38 L. J., Q. B. 137; L. R. 4 Q. B. 244.)

Signature binding, though contract not read.

The contract must be signed by the customer or his agent, or the person delivering the goods. If a man has an opportunity of reading the conditions, and chooses to sign them without reading them, he is nevertheless bound by them if they are reasonable. (*Lewis* v. *Great Western Rail. Co.*, 29 L. J., Ex. 425; 5 H. & N. 867.) A man who knows that a consignment note will have to be signed, and sends the goods to be delivered by a servant who cannot read, is bound by a contract entered into by the servant, although the latter states that he was ignorant of its contents; for a man who can read and who sends an agent who cannot read to sign a document or enter into a contract in which a document must to his knowledge be signed, must be taken to be in the same position as though he signed it himself without

reading it. (*Kirby* v. *Great Western Rail. Co.*, 18 L. T., N. S. 658; *Foreman* v. *Great Western Rail. Co.*, 38 L. T., N. S. 851; and see *Parker* v. *South Eastern Rail. Co.*, 46 L. J., C. P. 768; L. R., 2 C. P. D. 416, per Mellish, L. J.) There may be cases, however, in which he would not be bound; for example, if a man was unable to read, and the contents of the paper were not truly stated to him (*Lewis* v. *Great Western Rail. Co.*, *supra*, per Bramwell, B.); and in a case where it was dark in the office when the goods were brought, and the clerk required the person bringing them to sign a receipt note, not informing him of its contents, and there was not light enough to read, but telling him on his expressing reluctance that it was a mere formality and of no consequence, and it contained conditions which it was necessary should be signed to be binding, the Court held that a signature obtained under such circumstances was of no avail, and that there was no contract by reason of the fraud. (*Simons* v. *Great Western Rail. Co.*, 2 C. B., N. S. 626; 29 L. T. 182.)

Signature by common agent of both parties.

A railway agent employed by the sender to deliver, and by the company to receive goods, would be considered the agent of both parties, and could sign as agent for the sender. (*Aldridge* v. *Great Western Rail. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.)

Reasonableness of conditions depends upon circumstances.

There is no such thing as reasonableness in the abstract, and in dealing with conditions by which a company limit their liability, it is necessary to take into consideration the facts with reference to which they would be reasonable or un-

reasonable (*Lewis* v. *Great Western Rail. Co.*, 47 L. J., Q. B. 131; L. R., 3 Q. B. D. 45, per Cotton, L. J.), for a condition reasonable as to one state of facts may be applied to another state of facts which makes it unreasonable (*Gregory* v. *West Midland Rail. Co.*, 33 L. J., Ex. 155; 2 H. & C. 944), and a condition applying to live animals and dead stock may be good as to the one and void as to the other. (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83; L. R., 2 Ex. 173, per Channell, B.) The reasonableness or unreasonableness of a condition will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company were bound by the common law or by statute to carry the articles on being paid the customary hire, or whether it was in their power to reject them altogether, and refuse to carry them on any terms, and whether or not the customer had a reasonable alternative offered of having the goods carried free from such restrictive conditions.

The onus of proving conditions to be reasonable lies on the company.

The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favour of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition and yet agreed to it. (*Lewis* v. *Great Western Rail. Co.*, *supra.*)

How far conditions are severable.

In *Rooth* v. *North Eastern Rail. Co.* (36 L. J., Ex. 83; L. R., 2 Ex. 173), it was doubted whether a condition can be severed so as to allow it to be good in part and bad in part; and in a case at *nisi prius* (*Kirby* v. *Great Western Rail. Co.*, 18

L. T., N. S. 658) Martin, B., held that a whole set of conditions in a consignment note is bad if any part of it is unreasonable. A contrary rule has, however, been acted upon in other cases, and in *Simons* v. *Great Western Rail. Co.* (26 L. J., C. P. 25; 18 C. B. 805), Jervis, C. J., said, "I think we are bound to look at the particular matters relied on to see if they are just and reasonable; and we are not entitled to look through the whole of the regulations, some of which are not relied upon, to see if any of them may be considered unjust or unreasonable."

Instances of such conditions as have been held reasonable, and others that have been held unreasonable, will indicate the leaning of the Courts. But they will only be proximate guides, since the particular circumstances of each case must play so important a part in deciding whether a condition is reasonable or not.

Reasonable conditions.

The following conditions have been held to be reasonable:—

Goods carried at special rates.

"Goods conveyed at a special or mileage rate must be loaded and unloaded by the owners or their agents, and the company will not be responsible for any risk of stowage, loss or damage, however caused, nor for discrepancy in the delivery as to either quantity, number or weight, nor for the condition of articles so carried, nor for detention or delay in the conveying or delivery of them however caused." (*Simons* v. *Great Western Rail. Co.*, 26 L. J., C. P. 25; 18 C. B. 805.)

Loss of market.

"That the company will not, under any circumstances, be liable for loss of market, or other

claim arising from delay or detention of any train, whether at starting or at any of the stations, or in the course of the journey;" the claim being for loss of market. (*White* v. *Great Western Rail. Co.*, 26 L. J., C. P. 158; 2 C. B., N. S. 7; see also *Lord* v. *Midland Rail. Co.*, L. R., 2 C. P. 339; 36 L. J., C. P. 170.)

Injury to live stock.

"The company is to be held free from all risk or responsibility in respect of any loss or damage arising in the loading or unloading, from suffocation, or from being trampled on, bruised, or otherwise injured in transit, from fire, or from any cause whatever. The company is not to be held responsible for carriage or delivery within any certain or definite time, nor in time for any particular market;" the claim being for suffocated and injured cattle sent by rail. (*Pardington* v. *South Wales Rail. Co.*, 26 L. J., Ex. 105; 1 H. & N. 392; but see *Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83.)

Claim to be made within limited time.

"No claim for deficiency, damage, or detention shall be allowed unless made within three days after delivery of the goods, nor for loss, unless made within seven days after the time when they should have been delivered." (*Simons* v. *Great Western Rail. Co.*, *supra;* and see *Lewis* v. *Great Western Rail. Co.*, 29 L. J., Ex. 425; 5 H. & N. 867.)

Incorrect description.

"The company will not be answerable for the loss or detention of any goods untruly or incorrectly described or declared in the declaration or receiving note furnished by the company." (*Lewis* v. *Great Western Rail. Co.*, *supra.*)

Detention of fish.

"The company will not undertake to convey

fish except under the general conditions published at the railway stations, in the train tables, and except under the following special conditions (which were signed by the plaintiff):—that the company shall not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud;" in answer to a claim where the fish arrived too late for market. (*Beal* v. *South Devon Rail. Co.*, 29 L. J., Ex. 441; affirmed 3 H. & C. 337.)

Liability for damage to horses and dogs.

"The company will not be liable in any case for loss or damage to any horse or other animal above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being *in any event* liable to any greater amount than the value so declared. The company will in no case be liable for any injury to any horse or other animal, or dog, of whatever value, when such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2*l.* 10*s.* per cent., or 6*d.* per pound upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried." (*Harrison* v. *London, Brighton and South Coast Rail. Co.*, 31 L. J., Q. B. 113; 2

B. & S. 152.) In a recent case, however, this decision was dissented from, and the condition held unreasonable, as being framed to cover even the wilful misconduct of the company. (*Ashenden* v. *London, Brighton and South Coast Rail. Co.*, 28 W. R. 511.)

Goods to be carried beyond the company's line.

"The company will not be answerable in respect of goods destined for places beyond the limits of the company's railway; and as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier." (*Aldridge* v. *Great Western Rail. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.)

Low rates of carriage.

In *Robinson* v. *Great Western Rail. Co.*, 35 L. J., C. P. 123, the plaintiff knew there was a certain rate for carrying horses on a railway by passenger train and in horse-boxes, and that there was a lower rate for carrying them by goods train and in cattle trucks. It was held a reasonable condition of the latter mode of conveyance that the horses should be carried at the owner's risk, and that such a condition would protect the company if the horses were injured on the journey; but would not protect them for non-delivery where the contract was to deliver within a reasonable time (approved and followed, *D'Arc* v. *London and North Western Rail. Co.*, L. R., 9 C. P. 325; 22 W. R. 919); the

ground on which this condition was held reasonable being that the charge was proportioned to the risk, and the customer had the alternative of paying a higher charge with more responsibility on the part of the company.

Reasonable alternative.

Where there is a *bonâ fide* and reasonable alternative (not colourable) as to rate or otherwise, any terms may be imposed. (*Great Western Rail. Co.* v. *Glenister*, 22 W. R. 72, per Blackburn, J.) It is a fair and reasonable alternative if the company charge two rates, one the ordinary parliamentary rate, and a reduced rate, and they offer to carry at the ordinary rate upon the ordinary liability of common carriers, and at the reduced rate subject to a condition that the sender relieves them from all liability for loss or damage, except upon proof that the same arose from wilful misconduct on the part of the company's servants, and such a condition is valid. (*Lewis* v. *Great Western Rail. Co.*, 47 L. J., Q. B. 131; L. R., 3 Q. B. D. 45; *Harris* v. *Midland Rail. Co.*, 25 W. R. 63; *Haynes* v. *Great Western Rail. Co.*, 41 L. T., N. S. 436.)

Wilful misconduct of company's servants.

Fair option of alternative must be allowed.

To enable a company to rely on an alternative contract offered to the customer it must appear that such alternative was itself reasonable. A company cannot offer the choice of two unreasonable conditions, and then rely on the one actually chosen. (*Lloyd* v. *Waterford and Limerick Rail. Co.*, 15 Ir. C. L. 37.) Where the servant of a sender of goods signed a consignment note, on which there was a notice that the company charged alternative rates, lower or higher as the goods were carried at the owner's or company's risk, and it was in evi-

dence that the higher rate was posted up in the office of the company, and that if the sender had declined to send on the conditions contained in the consignment note at the lower rate, a general consignment note would have been offered to him for carriage of the goods at the higher rate, and that the consignment note signed had been in general use for a long time, and had on previous occasions been adopted by the sender, it was held there was a sufficient offer of an option to render the contract contained in the consignment note reasonable. (*Foreman* v. *Great Western Rail. Co.*, 38 L. T., N. S. 851.)

It is a question for a jury whether the higher rate is unreasonable, in the sense that it is so high as to be prohibitory; and the fact that the lower rate is so low that cattle dealers invariably avail themselves of it is not, standing alone, evidence that the higher rate is unreasonable or prohibitory. (*Ib.*)

Sea transit. Where a company receive goods and animals to be carried partly by sea and partly by land, a condition exempting them from any loss or damage which may arise during the sea transit, from the act of God, the King's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, will be valid if published in a conspicuous manner in their booking office, and printed in a legible manner on the receipt or freight note which the company gives for such goods or animals. (31 & 32 Vict. c. 119, s. 14.)

Conditions framed to exempt the company from loss or injury, however caused, including, therefore, gross negligence and even fraud or dishonesty on the part of the company's servants, are bad. (*Ashenden* v. *London, Brighton and South Coast Rail. Co.*, 28 W. R. 511; *ante*, p. 70.) The following are instances of conditions that have been held unreasonable:— Unreasonable conditions.

"The bearer undertakes all risk of loading, unloading, and carriage, whether arising from the negligence or default of the company or their servants, *or from defect or imperfection in the station, platform, or other places of loading or unloading*, or of the carriage in which they may be loaded or conveyed, or from any other cause whatsoever," although accompanied by an undertaking to "grant free passes to persons having the care of live stock." (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83; L. R., 2 Eq. 173.) Company not to be liable for their own defaults or defects of station.

"With respect to animals, &c. carried by sea, the company shall be exempt from liability for any loss or damage which may arise during the carriage of such animals by sea, from dangers and accidents of the sea, &c., improper, careless, or unskilful navigation, or any default or negligence of the master or any of the officers or crews of the company's vessels." (*Doolan* v. *Midland Rail. Co.*, L. R., 2 App. Ca. 792; 37 L. T., N. S. 317.) Company not to be liable for negligence of their servants,

"The company shall not be responsible for the loss of or injury to any marbles, musical instruments, toys or other articles, which from their brittleness, fragility, delicacy, or liability to ignition are more than ordinarily hazardous, unless nor for hazardous goods, unless insured.

declared and insured according to their value." (*Peek* v. *North Staffordshire Rail. Co.*, 32 L. J., Q. B. 241; 10 H. L. C. 473.)

Not liable for loss, etc. of goods imperfectly packed.

"The company will not be accountable for the loss, detention or damage of any package insufficiently or improperly packed, marked, directed or described, or containing a variety of articles liable by breakage to damage each other." (*Simons* v. *Great Western Rail. Co.*, 26 L. J., C. P. 25; 18 C. B. 805.) Here the entire package was lost, and the company relied on this condition and the bad packing as a defence. (And see *Garton* v. *Bristol and Exeter Rail. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112.)

Conveyance to be entirely at the owner's risk.

"This ticket is issued subject to the owner undertaking all risk of conveyance, loading, and unloading whatsoever, as the company will not be responsible for any injury or damage (howsoever caused), occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway, or in their vehicles." (*M'Manus* v. *Lancashire and Yorkshire Rail. Co.*, 28 L. J., Ex. 353; 4 H. & N. 327; *Gregory* v. *West Midland Rail. Co.*, 33 L. J., Ex. 155; 2 H. & C. 944; *M'Cance* v. *London and North Western Rail. Co.*, 31 L. J., Ex. 65; 7 H. & N. 477.)

Company not liable for empties.

"The company will not be answerable for the loss or detention of, or damage to wrappers or packages of any description charged by the company as 'empties.'" (*Aldridge* v. *Great Western Rail. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.)

Over carriage.

"The company are not to be answerable for any

consequences arising from overcarriage, detention, or delay in, or in relation to the conveying or delivery of the said animals, however caused." (*Allday* v. *Great Western Rail. Co.*, 34 L. J., Q. B. 5; 5 B. & S. 903; *Kirby* v. *Great Western Rail. Co.*, 18 L. T., N. S. 658.)

Packed parcels.

"That 50 per cent. extra on the ordinary rates shall be paid upon all 'packed parcels,'—that is, packages of common carriers', containing several parcels of different persons packed together." (*Garton* v. *Bristol and Exeter Rail. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112.)

The cases decided seem to have established the following leading principles:—

Principles established by the cases.

1. Any stipulation or condition, framed without limitation or exception, to exempt a company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable.

2. A condition is reasonable which reduces a company's liability to a minimum if it is coupled with compensating advantages to the customer (such as cheapness of carriage), and the latter has the alternative of getting rid of the condition by paying a reasonably higher rate.

3. A condition is reasonable which exempts a company from any liability for extraordinary loss to the customer (such as that of market or profit, or deterioration from innate infirmity), caused by those ordinary detentions to which goods traffic is subject; especially if the goods are such as the company only profess to carry on special terms, and are peculiarly liable to deterioration.

CHAPTER V.

COMPANY'S RIGHTS IN RESPECT OF CHARGES FOR CARRIAGE.

SECT. 1.—*Tolls and Charges which may be taken and made.*

Company not bound to carry unless the carriage is paid.

A RAILWAY company have a right to their reasonable hire, and may in the first instance refuse to take charge of goods unless previously paid the price of their carriage; or having conveyed them to their place of destination may decline delivering them until payment. But it is not necessary to support an action for refusing to carry, that the satisfaction should have been tendered in the strict sense of that term as applied to antecedent debts. It is sufficient if the consignor was ready and willing to deal for ready money, and notified that willingness to the carrier; the money is not required to be paid down until the carrier receives the goods which he is bound to carry. (*Pickford* v. *Grand Junction Rail. Co.*, 8 M. & W. 372.)

If the price of carriage is not paid when the goods are received the company cannot *sue for* such price till they are delivered. (*Barnes* v. *Marshall*, 18 Q. B. 785; 21 L. J., Q. B. 388.)

Goods delivered for carriage,

Having once acquired the lawful possession of goods for the purpose of carriage, a carrier is not

bound to restore them to the owner again, even if the carriage is dispensed with, unless upon being paid his due remuneration. (Story, Bail. s. 585.)

hire to be paid, though carriage dispensed with.

The tolls demandable are defined and regulated by the special act of each company according to a mileage rate, and a company may charge according to the mileage where the transit is not by the shortest route, if such route is reasonable, usual, and accustomed. (*London and South Western Rail. Co.* v. *Myers*, 39 L. J., C. P. 57; L. R., 5 C. P. 1.)

Tolls are defined by the company's special act.

Section 92 of the Railways Clauses Consolidation Act (8 & 9 Vict. c. 20), provides that "it shall not be lawful for the company at any time to demand or take a greater amount of toll or make any greater charge for the carriage of passengers and goods than they are by this and the special act authorized to demand." (*Lloyd* v. *Northampton and Banbury Rail. Co.*, 23 Sol. Jour. 623; *Aberdeen Commercial Co.* v. *Great North of Scotland Rail. Co.*, 22 Sol. Jour. 839.)

For the purpose of ascertaining the tolls demandable in any instance the special act of the company must be referred to. The rates vary very greatly; some companies on account of peculiarity of position, gradients, &c., being empowered to make much higher charges than others. They were settled according to no fixed principle, but according to the individual circumstances of each company. The tolls on goods are regulated according to a classification in which regard is had to the nature of the commodities, and a larger charge permitted for goods of a higher value than for

such as are heavy and require a less degree of care and entail a smaller amount of responsibility.

The company are bound to adhere to the classification they promulgate, and they cannot in favour of any particular class of customers charge goods as falling within one class which they charge to another as falling within a different class, and any excess of charge from such a cause they will be bound to refund to the customer. (*Parker* v. *Great Western Rail. Co.*, 3 R. C. 562; 13 L. J., C. P. 105; *Garton* v. *Bristol and Exeter Rail. Co.*, 30 L. J., Q. B. 273; 1 B. & S. 112.)

Tolls must be reasonable.

Railway companies are subject to the common law liability of charging reasonably, so that if their special act gives them a discretion as to the amount of rates applicable to a particular class or description of goods it must be exercised in a reasonable manner, and the rates imposed will not be binding if unreasonable, or if not charged equally to all persons. (*Sutton* v. *Great Western Rail. Co.*, 35 L. J., Ex. 18; 38 *ib.* 177.)

The following provisions are made by 8 & 9 Vict. c. 20:—

A list of all the tolls authorized by the special act to be taken and which shall be exacted by the company must be exhibited on boards in a conspicuous place at all stations where tolls are payable (s. 93), and milestones and posts at the distance of one quarter of a mile from each other must be set up and maintained by the company. (s. 94.) No tolls shall be demanded or taken for the use of the railway during any time whilst such boards are not exhibited or whilst such mile-

stones as aforesaid shall not be set up and maintained. (s. 95.) This last section has, however, been regarded as relating only to charges for the use of the company's line by persons conveying their own goods over the line in their own carriages. (*Wallis* v. *London and South Western Rail. Co.*, 39 L. J., Ex. 57; L. R., 5 Ex. 62.)

Power to vary tolls.

Sect. 90, after reciting that it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the purposes of the traffic, but that such power should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively or unfairly creating a monopoly either in the hands of the company or of particular parties; enacts that "it shall be lawful for the company, subject to the provisions and limitations herein, and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any portion of the railway as they shall think fit: provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular company or person travelling upon or using the railway."

Tolls to be charged equally under like circumstances.

The chief decisions under this section have already been noticed (see Chap. III., p. 25).

"Tolls" defined.

The interpretation clause (sect. 3) provides, that "the word 'toll' shall include any rate or charge or other payment, payable under the special act for any passenger, animal, carriage, goods, merchandize, articles, matters, or things conveyed on the railway."

In *Evershed* v. *London and North Western Rail. Co.* (48 L. J., Q. B. 22; L. R., 3 App. Ca. 1029), the question was raised, but not determined, whether the word "tolls" in the interpretation clause is confined to a charge for carrying goods on the railway, or includes the cartage outside. In *Pegler* v. *Monmouthshire Rail. Co.* (30 L. J., Ex. 249; 6 H. & N. 644), it was considered that "tolls" *primâ facie* included everything that the company do as carriers, and therefore where a company were entitled by their act to demand certain tolls therein specified, they were not entitled to charge any sum as a "terminal charge" over and above the tolls authorized by their act, and that such charge could only be made by previous agreement. (And see *Locke* v. *North Eastern Rail. Co.*, 21 Sol. Jour. 835.)

"Terminal charges."

Services incidental to the business of a carrier.

In *Lancashire and Yorkshire Rail. Co.* v. *Gidlow* (45 L. J., Ex. 625; L. R., 7 H. L. 517), the company had charged a customer more for the carriage of coals than the maximum charges fixed by their act, and sought to justify the charge under a clause authorizing the charge of a reasonable sum for "services incidental to the business of a carrier," relying upon the fact that they had

allowed the customer to deposit his coals upon land adjoining one of their sidings, and that they had taken his wagons to and from a siding belonging to him, it was held that neither of these were "services incidental to the business of a carrier" within the meaning of the act.

Charge for stopping.

Where a company made, under the authority of their special act, a charge for the expense of stopping for all articles conveyed a less distance than four miles, it was held that this charge was not a "toll," and its publication on the toll board of the company not a condition precedent to the right to demand it. (*Pryce* v. *Monmouthshire Rail. Co.*, L. R., 4 App. Ca. 197; 49 L. J., Ex. 130.)

Cleansing cattle truck.

By a clause in their act a railway company were empowered to receive a certain rate as a maximum rate of carriage for the conveyance of animals exclusive of every expense incidental to such conveyance, *except for any extraordinary services* performed by the company, in respect of which they might make a reasonable extra charge; it was held that the cost of cleansing the truck in which a cow had been carried, as required by the Orders in Council, was not a service performed for the owner of the cow within the meaning of this clause. (*Cox* v. *Great Eastern Rail. Co.*, 38 L. J., C. P. 151; L. R., 4 C. P. 181.)

Any ambiguity in a clause imposing tolls is to be construed in favour of the public. (*Stockton and Darlington Rail. Co.* v. *Barrett*, 7 M. & G. 870; *Pryce* v. *Monmouthshire Railway Company*, *supra*.)

The following provisions as to tolls are made in 31 & 32 Vict. c. 119 :—

Company bound to furnish particulars of charges.

Where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on written application within a week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularizing the several items of which the last mentioned portion of the charge may consist. (Sect. 17.)

Charge when two railways worked by one company.

Where two railways are worked by one company, then in the calculation of tolls and charges for any distance in respect of traffic (whether passengers, animals, goods, carriages or vehicles), conveyed on both railways, the distances traversed shall be reckoned continuously on such railways as if they were one railway. (Sect. 18.)

Through rates.

Provisions for the making of through rates over different lines of railway are also contained in 36 & 37 Vict. c. 48, s. 11.

Company to keep at every station a rate-book,

This act also provides—"That every railway company and canal company shall keep at each of their stations and wharves a book or books show-

ing every rate for the time being charged for the carriage of traffic other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station, or wharf, to every station, wharf, siding or place to which any such rate is charged. Every such book shall, during all reasonable hours, be open to the inspection of any person, without the payment of any fee. Any company failing to comply with the provisions of this section shall, for each offence, and, in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding 5*l.*," to be recovered as therein mentioned. (Sect. 14.)

to be open to public inspection free.

Penalty for non-compliance.

The act further gives the Railway Commissioners power to determine any question or dispute which may arise with respect to the terminal charges of any railway company where such charges have not been fixed by act of parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering, collection, delivery, and other services of a like nature. (Sect. 15.)

Power of Railway Commissioners to fix terminal charges.

Railway companies would seem to be entitled to compensation for expenses necessarily incurred by them in the preservation of goods from extraordinary perils not properly arising from their ordinary duty as common carriers. As if a sudden flood or storm should do injury to the goods, and some immediate expense for their preservation should become necessary, the company would be

Expenses incurred for the preservation of the property carried.

bound to incur it, and would be entitled to call upon the owner for re-imbursement. (Story, Bail. s. 586.) Or, if to preserve the life or condition of cattle carried by the company during a long journey, or after the journey was ended, it should be necessary to feed them, the owner not having provided the means of doing so, the company could recover from the owner the reasonable amount expended by them in this respect. (*Great Northern Rail. Co.* v. *Swaffield*, 43 L. J., Ex. 89; L. R., 9 Ex. 132.)

Charges for warehousing.

If after the termination of the journey the goods are, for the convenience of the owner, warehoused by the company, they will be entitled to be paid warehouse room for the goods—at least, after a reasonable time from the termination of the transit.

Sect. 2.—*Lien for Charges.*

Lien on goods carried,

Inasmuch as railway companies, like other common carriers, are bound by custom to carry goods for all persons, for a reasonable reward, they are entitled by the common law to a lien on the goods; and, unless they have entered into some special contract by which the right is waived, have a right to detain goods which they have received to be carried until the charges of carrying have been paid to them by the owner or employer. (*Skinner* v. *Upshaw*, 2 Ld. Raym. 752.) And they have the same right when goods have been delivered to them by a wrongful owner and are claimed by a rightful owner, to detain them from the latter

until their charges are paid. (*Yorke* v. *Grenaugh*, 2 Ld. Raym. 867; per Holt, C. J.)

The common law right is a specific lien; that is, a right to detain for the carriage of the particular goods, and not for those goods and any other balance the owner may owe for the carriage of other goods. (*Butler* v. *Woolcott*, 2 B. & P., N. R. 64.) The latter right, called a general lien, can only be supported by proof of general usage, special agreement, or mode of dealing, supporting such a claim. (*Rushforth* v. *Hadfield*, 6 East, 519; 7 *ib.* 224; *Wright* v. *Snell*, 5 B. & Ald. 350.) And the fact that a carrier has a right of general lien against a consignor does not entitle him as against the consignee to retain the goods in respect of a general balance due from the consignor (*Butler* v. *Woolcott*, *supra*); nor can a general lien as against the consignee affect the right of the consignor to stop the goods *in transitu*, and claim their return upon paying the specific claim for carriage. (*Oppenheim* v. *Russell*, 3 B. & P. 42; *Jackson* v. *Nichol*, 7 Scott, 577; and see notes to *Chase* v. *Westmore*, Tu. L. C., Merc. L. 690 *et seq.*)

is specific, not general.

A right of lien is defeated by giving up possession of the goods; or by dealing with them in such a manner as to amount to a conversion of them; and if once waived it cannot afterwards be resumed. (*Kruger* v. *Wilcox*, Tu. L. C., Merc. L. 676, 708.) But if possession was obtained by fraud, it seems the carrier's lien would revive on regaining possession of the goods. (See *Wallace* v. *Woodgate*, Ry. & M. 194.)

Lien waived by giving up possession.

A right of lien confers no right of sale upon the

Lien confers no

right at law to sell.

person holding such lien, though the retention of the chattels may be attended with expense. (*Thames Ironworks Co.* v. *Patent Derrick Co.*, 29 L. J., Ch. 714; 1 J. & H. 93.)

General lien and right to sell given to companies by statute,

Sect. 97 of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), provides as follows:—

"If, on demand, any person fail to pay the tolls due in respect of any carriage *or goods*, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the moneys arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the moneys arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

only applies where persons use their own carriages on the line.

This section has, however, been held not to apply where the tolls are due to the company for the conveyance by them of goods as carriers, but only where they are due from persons who have used the line by conveying goods thereon in their own carriages. (*Wallis* v. *London and South Western Rail. Co.*, 39 L. J., Ex. 57; L. R., 5 Ex. 62; but see *Re Northfield Iron and Steel Co.*, 14 L. T., N. S. 695.)

A demand necessary before sale.

A demand for the sum actually due for tolls is a condition precedent to the right to sell (*Field* v.

Newport, &c. Rail. Co., 27 L. J., Ex. 396; 3 H. & N. 409), and where the amount is paid by a bill which on presentment is dishonoured, that is not a demand and refusal entitling the company to sell the customer's goods (*North* v. *London and South Western Rail. Co.*, 32 L. J., C. P. 156; 14 C. B., N. S. 132.)

General lien by express contract: how affected by winding-up of customer.

Very often a company have a general lien upon the goods of their customers by virtue of special agreements. Where a railway had such an agreement with a joint stock company which was wound up, and the business carried on by an official liquidator, who continued to forward goods by the railway, it was held that the general lien would only attach to goods coming into the hands of the railway company while the joint stock company was *sui juris*, and not to goods coming into their hands after the winding-up order. (*Wiltshire Iron Co.* v. *Great Western Rail. Co.*, 40 L. J., Q. B. 43, 308; L. R., 6 Q. B. 776.)

Company may not use goods.

In no case have the company a right to use the goods detained by them. And if perishable articles be detained they are bound to exercise every care in their preservation, and if horses or cattle be detained the company should feed them, and in the case of cows milk them. (*Scarfe* v. *Morgan*, 4 M. & W. 270.)

Lien only on goods in the company's possession as carriers.

The right of lien can only apply to goods, &c., in the possession of the company in their character of carriers or in a capacity accessory thereto, and not to goods delivered to them in some independent capacity, as where the company have a workshop for repairing engines, repairing for strangers as

well as themselves, they would not be justified in detaining the engine of a customer in their possession for repair, in respect of a sum due to them for carriage. (*Kinnear* v. *Midland Rail. Co.*, 19 L. T., N. S. 387.)

Company's remedy by action.

In addition to their right of lien on goods, a company have a right of action for their charges for carriage, and for other monies properly expended by them in reference to the goods.

CHAPTER VI.

THE TRANSIT.

SECT. 1.—*Duty of the Company during the transit.*

UNDER the term transit we include the period from the time of traffic coming into the custody of the company for the purpose of immediate conveyance to the time when nothing remains to be done by them under their contract to carry.

Duty of company to carry safely.

The first duty of a carrier is to carry safely. (*Great Northern Rail. Co.* v. *Taylor*, 35 L. J., C. P. 210; L. R., 1 C. P. 385.) Therefore it is the duty of a railway company during the transit to use all such diligence and care towards the goods entrusted to them that prudent and cautious men in the like business usually employ for the safety and preservation of the property confided to their charge. (*Beal* v. *South Devon Rail. Co.*, 3 H. & C. 337; 12 W. R. 1115.) For this purpose they must have their stations and yards in a safe condition, so that those who use them by the company's invitation may do so without injury to themselves or the traffic they bring or remove. (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83.) They must provide proper trucks and vehicles for the transportation, with all reasonable equipments and servants to take care of them. (*Beckford* v. *Crutwell*, 5 C. & P. 242.) They must have their through communications so arranged as not to cause undue delay, their permanent way in such a

state as not, by shaking, to make the chafing or wear and tear of the goods unduly severe. They must have proper tarpaulins and coverings to protect the goods from damage by exposure.

Proper carriages to be provided.

A company are bound to provide trucks or vehicles reasonably fit for the conveyance of the particular class of goods they undertake to carry (*Lyon* v. *Mells*, 5 East, 428; *Shaw* v. *York and North Midland Rail. Co.*, 18 L. J., Q. B. 181; 13 Q. B. 347); and they will be liable for injury from the defects of a truck, even if it belongs to another company, if they adopt it for the purposes of their own transit. (*Combe* v. *London and South Western Rail. Co.*, 31 L. T., N. S. 613.) But it is sufficient if the company provide a carriage which, without extraordinary accident, will probably perform the journey. (*Amies* v. *Stevens*, 1 Str. 128; *Great Western Rail. Co.* v. *Blower*, 41 L. J., C. P. 268; L. R., 7 C. P. 655, per Willes, J.)

In the transit of animals,

spring buffer wagons to be used.

Over-crowding.

Sheep freshly shorn.

In the transit of animals the following regulations are required to be observed under Orders in Council issued under the Contagious Diseases (Animals) Acts:—Every truck used for carrying animals shall be provided with spring buffers, and the floors thereof shall have proper battens or other footholds thereon. A railway company shall not allow any truck used for carrying animals on their railway to be overcrowded so as to cause unnecessary suffering to the animals therein. Between each 1st November and the following 30th April (both dates inclusive) trucks used for carrying on a railway sheep freshly shorn (that is, shorn within sixty days of their being carried by railway) and unclothed shall be covered and en-

closed so as to protect the sheep from the weather, but shall be properly ventilated. Every pen, carriage, truck, horse-box, or vehicle used for carrying animals (the word "animals," in this case, including horses) on land shall on every occasion after any animal is taken out of the same, and before any other animal is placed therein, be cleansed and disinfected.

Vehicles to be cleansed and disinfected.

In vehicles used for the transit of animals the floor boards should be sound, the fastenings to the doors sufficient to properly secure them.

Casks, and articles likely to suffer by wear and tear, should be packed and forwarded in a manner to reduce the wear and tear to a minimum.

The company must take care not to forward in the same truck goods which from their proximity would be likely to damage each other: thus, they would be liable for injury to flour caused by the effluvium of spirits of turpentine, or damage to cambric goods caused by sulphuric acid if stowed near together. (*Alston* v. *Herring*, 11 Ex. 822; 25 L. J., Ex. 177.) So it is assumed if goods were placed in a truck and injured by the effluvium of goods previously carried in the same truck. If goods are of a class likely to be injured by coming in contact with other goods, the fact should be communicated to the company, otherwise they will not be liable. (*Hutchinson* v. *Guion*, 28 L. J., C. P. 63; 5 C. B., N. S. 149.)

Goods injurious to each other not to be stowed together.

The company must use the ordinary precautions to lessen as much as possible the ordinary wear and tear of goods: as if a cask of brandy leak on the journey they must take steps to stop the leak

when it comes to their knowledge, otherwise they will be liable for the loss (*Beck* v. *Evans*, 16 East, 244); and though not liable for ordinary deterioration of goods in quantity or quality from inherent infirmity, yet if the goods require airing or ventilation during the journey for the purposes of preservation, as fruits and such like articles sometimes do, they must do what is reasonably within their power for this purpose. (*Davidson* v. *Gwynne*, 12 East, 381.) And in the case of animals on a long journey it may be necessary to feed them. (*Taff Vale Rail. Co.* v. *Giles*, 23 L. J., Q. B. 43, per Pollock, C. B.; *Great Northern Rail. Co.* v. *Swaffield*, 43 L. J., Ex. 89; L. R., 9 Ex. 132.)

The directions of the owner must be obeyed.

The company must obey the directions of the owner of the goods during the transit; and a person who delivers goods to a railway company to carry, directed to a particular place, may countermand the direction at any moment of the transit and demand back his goods, at least on payment of the carriage, unless perhaps where the unpacking and delivering would be productive of much inconvenience. (*Scotthorn* v. *South Staffordshire Rail. Co.*, 22 L. J., Ex. 121; 8 Ex. 341.)

Sect. 2.—*Stoppage in Transitu.*

When the right to stop *in transitu* exists.

If the seller has dispatched goods on credit to the buyer, and before they reach their destination the buyer becomes insolvent, the law, in order to prevent the loss that would happen to the seller, allows him in many cases to countermand the de-

livery before the arrival of the goods at the place of destination, and to cause them to be re-delivered to himself. (*Lickbarrow* v. *Mason*, 1 Smith's L. C. 699; *Whitehead* v. *Anderson*, Tu. L. C., Merc. L. 632, and notes.)

The right to stop *in transitu* exists only where the following circumstances concur:—where the goods are sold on credit; where the consignee is insolvent; and where the goods are still in transit, and have not been delivered to the consignee. (Story, Bail. s. 581.)

The right is a kind of equitable lien of vendor.

This right has been described as a species of equitable lien, and even before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 24, sub-s. 4) was recognized and acted upon by the common law courts for the purpose of substantial justice (*Tucker* v. *Humphrey*, 4 Bing. 519, per Park, J.), and where it is properly exercised by the consignor the carrier is excused from delivering to the consignee.

Who may stop.

The right to stop *in transitu* is strictly confined to the unpaid vendor of goods sold (*Kinloch* v. *Craig*, 3 T. R. 783), or to persons who stand in that position. Thus, a factor or agent who obtains goods on his own credit for an undisclosed principal is *quoad* his principal an unpaid vendor. (*Feise* v. *Wray*, 3 East, 93; *Van Casteel* v. *Booker*, 18 L. J., Ex. 17, per Parke, B.; *The Tigress*, 32 L. J., Adm. 97.) So a person who had consigned goods to be sold on the joint account of himself and the consignee, was held entitled to stop them, the consignee having become insolvent. (*Newsom* v. *Thornton*, 6 East, 17.) A mere surety for the

price of the goods (*Siffken* v. *Wray*, 6 East, 371), or a person who claims a lien upon them for money and labour expended (*Sweet* v. *Pym*, 1 East, 4), has no such right.

Right not lost until the purchase money fully paid;

Part payment of the purchase money (*Hodgson* v. *Loy*, 7 T. R. 440), or taking the consignee's acceptances for part of the goods (*Edwards* v. *Brewer*, 2 M. & W. 375; *Patten* v. *Thompson*, 5 M. & S. 350), or for the whole, if the consignee become insolvent before the bills are due (*Kinloch* v. *Craig*, 3 T. R. 119), does not defeat the right, which continues until the whole purchase money is paid. (*Feise* v. *Wray*, *supra*.)

only exists while the goods are in a state of transit.

As the right only exists so long as the goods are *in transitu*, and until the goods come into the actual or constructive possession of the consignee, the majority of the decided cases have turned upon the question whether or not the goods had arrived at the termination of their journey when the notice to stop was given. The rule to be collected from the cases is, that the goods are *in transitu* so long as they are in the hands of the carrier *as such*, no matter whether he was or was not appointed by the consignee. (*Ex parte Rosevear Clay Co., Re Cock*, L. R., 11 Ch. D. 560; 40 L. T., N. S. 730.) To end the *transitus*, there must be an *actual delivery* of the goods to the vendee or his agent, not a mere constructive delivery, such as that to a shipmaster on the order of and engaged by the vendee. (*Ib.*)

When goods are *in transitu*.

As long as the goods are in the possession of the carrier and he holds them as such, the *transitus* is not at an end, nor until, by arrangement between him and the purchaser, he holds them as the pur-

chaser's agent. (*Ex parte Cooper, Re M'Laren*, 48 L. J., Bkcy. 49; L. R., 11 Ch. D. 68.)

As a general rule, a sub-sale of the goods while they are *in transitu* does not determine the *transitus*. (*Ex parte Golding Davis & Co., Re Knight*, 28 W. R. 481; 42 L. T., N. S. 270.)

The termination of the transitus a question of fact.

The question as to the continuance or the termination of the *transitus* is one to be determined by the facts of each particular case. (*Schotsmans* v. *Lancashire and Yorkshire Rail. Co.*, 36 L. J., Ch. 361; L. R., 2 Ch. 332.) It is of the very essence of the doctrine of stoppage *in transitu* that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with and the buyer who has not yet obtained actual possession. (*Ib.; Gibson* v. *Carruthers*, 8 M. & W. 328, per Rolfe, B.) Thus, where goods were delivered to a master of a ship who was the servant of the consignee, it was held to determine the right of stoppage (*ib.*); while delivery on board a ship chartered by the vendee under an ordinary charter party, not making him the owner or hirer of the ship, but merely operating as a contract to carry, was held not to end the *transitus*. (*Berndtson* v. *Strang*, 37 L. J., Ch. 665; L. R., 3 Ch. 588; *Coventry* v. *Gladstone*, 37 L. J., Ch. 492; L. R., 6 Eq. 44; *Ex parte Rosevear Clay Co., Re Cock, supra.*)

Delivery to a man's servant or agent, either special or general, is, in point of law, delivery to himself.

What is actual delivery.

The actual delivery to the vendee or his agent, which puts an end to the *transitus*, or state of pas-

sage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods, or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself; or it may be by the vendee's taking possession, by himself or agent, at some point short of the original intended place of destination. (*James* v. *Griffin*, 2 M. & W. 633, per Parke, B.) If the vendee take them out of the possession of the carrier into his own before their arrival at their destination, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent it may be a wrong to him for which he would have a right of action. (*Whitehead* v. *Anderson*, 9 M. & W. 534, per Parke, B.)

Carrier may be agent to receive and determine the *transitus*.

A carrier may be the agent of the purchaser, and by changing his character from carrier to such agent may determine the *transitus*; and the most difficult cases are those where, the actual journey being over, the goods still remain under the control of the carrier in his warehouse. Then the question becomes, does he hold them as carrier, or as warehouseman and agent for the consignee? This depends upon the intention of the carrier and consignee, and whether or not they have, expressly or by implication, entered into a new contract, distinct from the original contract for carriage, that the carrier is to hold them for the consignee as his agent, for the purpose of custody on his account, and subject to some new or further order to be given by him. (*Wentworth* v. *Outhwaite*, 10 M. & W. 450, per Parke, B.)

If there is any doubt whether the consignee has converted the carrier into his agent for custody, or for a new purpose other than carriage, the intention of the parties must be gathered from their various acts. The carrier cannot, without the consent of the consignee, convert himself into a warehouseman for the consignee, so as to terminate the *transitus*. (*Bolton* v. *Lancashire and Yorkshire Rail. Co.*, 35 L. J., C. P. 137; L. R., 1 C. P. 431; *Ex parte Barrow, Re Worsdell*, 46 L. J., Bkcy. 71; 25 W. R. 466; *James* v. *Griffin*, 2 M. & W. 623.) Neither would any act of constructive taking possession by the consignee, short of actual removal out of the possession of the carrier, unless accompanied with circumstances to denote that the carrier assented to hold them for the consignee, in the nature of an agent for custody, determine the *transitus*. (*Whitehead* v. *Anderson*, 9 M. & W. 535, per Parke, B.) A mere promise by the carrier to deliver the goods to the purchaser as soon as they can be got at, is not enough to bring them into the possession, actual or constructive, of the purchaser. (*Coventry* v. *Gladstone*, 37 L. J., Ch. 492; L. R., 6 Eq. 44.)

If the purchaser, having no warehouse of his own, is in the habit of using the warehouse of his carrier as his own, and making it the repository of his goods until he has sold them or shipped them for exportation, the *transitus* is at an end when the goods arrive at the customary place of deposit, although they may immediately afterwards receive a fresh destination. (*Scott* v. *Pettit*, 3 B. & P. 469; *Rowe* v. *Pickford*, 8 Taunt. 83; *Allan* v.

Gripper, 2 Cr. & J. 218; *Foster* v. *Frampton*, 6 B. & C. 107.)

Delivery of part, when delivery of the whole.

Different opinions have been held on the question of whether a part delivery is a constructive delivery of the entire goods comprised in the contract, so as to put an end to the right to stop *in transitu* as to the whole of the goods. At one time it was held that there was a constructive delivery of the whole. This, however, has since been questioned and dissented from, and it has been said only to be a constructive delivery of the whole where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole. (*Bolton* v. *Lancashire and Yorkshire Rail. Co.*, 35 L. J., C. P. 137; L. R., 1 C. P. 431; *Ex parte Cooper, Re M'Laren*, 48 L. J., Bkcy. 49; L. R., 11 Ch. D. 68; and see *Ex parte Gibbes, Re Whitworth*, 45 L. J., Bkcy. 10; L. R., 1 Ch. D. 101.)

Transit once ended, right cannot revive.

If the transit be once at an end it cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and ulterior destination. (*Valpy* v. *Gibson*, 16 L. J., C. P. 241; 4 C. B. 837.)

Notice must be given in due time to be effective.

A company are entitled to express notice from a consignor before they will be liable for not stopping goods *in transitu*. To make such a notice effective it must be given at such a time, and under such circumstances, that the company may by the exercise of reasonable diligence communicate it to their servants in time to prevent the de-

livery of the goods to the consignee. (*Whitehead* v. *Anderson*, 9 M. & W. 518.)

Who may give notice.

Notice by the vendor or his particular agent or by his general agent, if the act of the agent be afterwards recognized and confirmed by the principal, will be sufficient to stop the goods. (*Northey* v. *Field*, 2 Esp. 613; *Bailey* v. *Culverwell*, 8 B. & C. 448.) But notice by an unauthorized person will not be effectual unless ratified by the vendor within the time when he might himself have exercised the right. (*Bird* v. *Brown*, 4 Ex. 786.)

Carrier entitled to charges for carriage of goods stopped.

Where goods are stopped *in transitu*, the carrier is of course entitled to demand and have his hire for the carriage of such goods before giving them up. He cannot, however, as we have previously seen, claim to retain them as a lien for a general balance due from the consignee. (*Ante*, p. 85.)

Sect. 3.—*Rival Claimants.*

Sometimes a railway company is placed in an awkward position by claims upon the goods by persons other than and adverse to the party who delivered them. For instance, they may be followed and claimed by the sender's landlord for rent, or by a sheriff's officer under a writ of execution; or the consignor may have stolen the goods, and they may be claimed by the person from whom they were stolen, or the consignor may have become bankrupt, and the goods claimed by his trustee as fraudulently removed.

Rule as to carrier setting up a *jus tertii*.

Ordinarily the person who delivers the goods to the company is to be treated by them as the owner, and in general his title may not be disputed by the company, or a *jus tertii* or adverse title be set up, but the goods must be delivered according to his directions, without putting him to proof of his title. (*Laclouch* v. *Towle*, 3 Esp. 115.) That applies, however, only where such adverse claim is not asserted by the superior claimant to the sender, but merely by the carrier's own motion. But should the goods be the property of a third person, who is also entitled to the possession of them, and while in the custody of the company such owner should demand possession, they would be justified in delivering the goods to him. (See *Taylor* v. *Plumer*, 3 M. & S. 562.) Nor are they precluded by reason of having received goods from a particular individual from setting up the title of a third party really entitled thereto who has claimed and received the goods. (*Sheridan* v. *New Quay Co.*, 28 L. J., C. P. 58; 4 C. B., N. S. 618.) In this case Mr. Justice Willes, in delivering judgment, said, "The defendants were common carriers; and therefore bound to receive the goods for carriage. They could make no enquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner before the defendants had parted with the goods. The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the

goods, in the present event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample grounds for so holding."

Company must deliver to the right person.

Still the company have upon them the burthen and risk of ascertaining who is the real owner, which in the complication of mercantile transactions is not always an easy task. Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded, and he resists it, he is liable to an action for the recovery of the goods. (Story, Bail. s. 582.)

Interpleader.

But a company may compel rival claimants to establish their title by interpleader. (1 & 2 Will. 4, c. 58, s. 1; and 23 & 24 Vict. c. 126, s. 12.)

CHAPTER VII.

TERMINATION OF A RAILWAY COMPANY'S LIABILITY.

SECT. 1.—*Delivery to the Consignee.*

Common carriers' liability only determined by a delivery.

A COMMON carrier engages not only safely to carry, but he also engages safely to deliver. (*Bodenham* v. *Bennett*, 4 Price, 31; *Duff* v. *Budd*, 3 B. & B. 177.) It is immaterial whether there is negligence or not: his warranty as an insurer is broken by non-delivery. (*Richards* v. *London and South Coast Rail. Co.*, 18 L. J., C. P. 251; 7 C. B. 839, per Wilde, C.J.) Accordingly, a railway company's extraordinary liability as carriers is held to continue to the moment when their agents or servants deliver the goods actually or constructively to the consignee or his agent, or at the stipulated or authorized place of consignment (*Fowles* v. *Great Western Rail. Co.*, 22 L. J., Ex. 76; 7 Ex. 699; *Moffat* v. *Great Western Rail. Co.*, 15 L. T., N. S. 630), or until delivery has been waived, or the goods tendered to, and refused by, the consignee.

Liability continues, though the destination is beyond the company's termini,

This rule applies even where the point of delivery is to be reached by passing over the lines of other companies, or by the vehicles of other carriers not under the control of the receiving company. In such a case, the receiving company are just in the same position as if they had been the owners of all the means of transit employed for the

whole distance which the goods are to travel, and their liability does not end until there has been a delivery in what is the ordinary and usual course. (*Muschamp* v. *Lancaster and Preston Junction Rail. Co.*, 8 M. & W. 421, and cases cited *ante*, p. 9.)

unless their contract is only to carry to their own limits;

Where the place of ultimate destination is beyond the termini of the company, they may limit their contract to one to carry to their own terminus, and there deliver to the ulterior carrier. In such a case the liability of the receiving company will be at an end when they have placed the goods under the control of the ulterior carrier. (*Garside* v. *Trent Navigation Co.*, 4 T. R. 581; *Aldridge* v. *Great Western Rail. Co.*, 33 L. J., C. P. 161; 15 C. B., N. S. 582.) But, in case of loss of or damage to the goods, they must prove that the goods have actually passed in an uninjured state into the possession or under the control of the ulterior carrier. (*Kent* v. *Midland Rail. Co.*, 44 L. J., Q. B. 18; L. R., 10 Q. B. 1; but see *Midland Rail. Co.* v. *Bromley*, 25 L. J., C. P. 94; 17 C. B. 372.)

then they must prove delivery to ulterior carrier.

Degree of care to be used in delivery.

The precise degree of care which it is the duty of a carrier to use in delivering the goods entrusted to him must depend upon and vary with the nature and condition of the thing carried, and the ever varying circumstances under which the delivery takes place. Some goods require much more tender handling than others; some animals much more care and management than others, according to their nature, habits and conditions; and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier's place, and had to deal with the goods or animals under the circumstances and

subject to the condition in which the carrier is placed, and under which he is called on to act. (*Gill* v. *Manchester, Sheffield, &c. Rail. Co.*, 42 L. J., Q. B. 89; L. R., 8 Q. B. 186.)

Company cease to be carriers when their original contract is performed.

In the case of *Shepherd* v. *Bristol and Exeter Rail. Co.* (37 L. J., Ex. 113; L. R., 3 Ex. 189), it was held by the majority of the court (Bramwell and Channell, BB.) that the extraordinary responsibility of common carriers of goods ends when there is nothing more to be done by them under their contract as carriers; while Martin, B., dissenting, adopted the rule laid down in 2 Redfield's Railway Law, 56, that the extraordinary responsibility of a carrier, as such, does not terminate until the owner or consignee, by the use of diligence, had, or might have had, an opportunity of removing his property. But though the members of the court differed upon the particular facts of the case, the two rules are not irreconcilable, since it must always remain a question of fact whether the whole duty of the company under their contract has been performed (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83; L. R., 2 Ex. 173); and this would involve subsidiary questions, as to where the delivery ought to be made, and if made at the station of the company what notice ought, under the particular circumstances, to have been given, or opportunity allowed, to the consignee of removal. (*Chapman* v. *Great Western Rail. Co.*, 42 L. T., N. S. 252.)

Delivery depends upon the contract in each par-

The question in every case to determine the time at which the liability ends must be, what was the express contract, if there was one, or what was the implied contract if the goods were de-

livered to the company without an express contract? In the former case the duration of the liability will depend on the terms of the contract, and may therefore end at a point of time which falls far short of the implied common law liability. In the latter case the duration of the liability will in the majority of cases depend upon the custom of particular places, the usage of particular trades (Story, Bail. s. 543), or the nature of the thing to be delivered (*Rooth* v. *North Eastern Rail. Co.*, *supra*), and whether or not there has been what by previous dealings has been treated and accepted as a delivery. ticular case.

A company may or may not deliver at the edge of their rails (*Eversheed* v. *London and North Western Rail. Co.*, 47 L. J., Q. B. 284, per Brett, L. J.); but it is not enough to carry goods and then throw them out into the street, or leave them to be injured by exposure to the elements. They must be dealt with according to the nature of the articles (*Taff Vale Rail. Co.* v. *Giles*, 23 L. J., Q. B. 43; 2 E. & B. 823), and the usual known course of business of the company. (*Wise* v. *Great Western Rail. Co.*, 25 L. J., Ex. 258; 1 H. & N. 63.) Delivery at the edge of the rails.

It has often been discussed whether or not, independently of express stipulation upon the point, a carrier is bound to deliver inanimate goods at the residence or place of business of the consignee. It seems now to be clearly settled that where it is the usual custom of carriers to deliver goods, or particular classes of goods, by means of porters and drays at the actual places to which they are directed, they are bound so to deliver them, and their liability continues until such Delivery of goods at the place to which they are directed.

delivery, and that even where they are not bound to so deliver them, it is their duty, within a reasonable time, to give notice of their arrival to the consignee, and that their liability as carriers would continue during such a period as the consignee might by the exercise of reasonable diligence remove them. (*Golden* v. *Manning*, 2 W. Bl. 916; *Duff* v. *Budd*, 3 B. & B. 177; *Bourne* v. *Gatliffe*, 11 Cl. & F. 45; 4 Bing. N. C. 314; *Storr* v. *Crowley*, M'Cle. & Y. 129; *Mitchell* v. *Lancashire and Yorkshire Rail. Co.*, 44 L. J., Q. B. 107; L. R., 10 Q. B. 256.) But if a company have no means of communicating with the consignee, the absence of such a notice will not protract the liability of the company beyond a reasonable time. (*Chapman* v. *Great Western Rail. Co.*, 42 L. T., N. S. 252.)

A tender of delivery is sufficient.

A tender of delivery of the goods at the house of the consignee, and an offer to deliver them on receiving payment of the hire, is sufficient to discharge the carrier from further liability as carrier. (*Storr* v. *Crowley*, *supra.*) If the hire is not then paid, and the carrier retains the goods, he does so, subject only to the liability of a warehouseman.

Delivery within reasonable hours.

It has been decided by cases in the United States' Courts, which would probably be followed here (though I am aware of no English decision on the point), that if goods be tendered to a consignee late in the day, after the termination of the hours of business, and when the consignee has dismissed his hands, and is thus incapable of receiving and putting away the goods, the tender of delivery is then unreasonable as to time, and

the consignee is not guilty of laches in declining to receive them. Therefore the duty of the company under such circumstances is to keep the goods still in custody, and they continue to hold them under all their responsibility as carriers.

Consignee may waive right to delivery at the original destination.

The implied contract to deliver at the particular place to which goods are directed, is only to deliver there unless the consignee shall require them to be delivered at some other place. (*London and North Western Rail. Co.* v. *Bartlett*, 31 L. J., Ex. 92; 7 H. & N. 400; *Cork Distillery Co.* v. *Great Southern &c. Rail. Co.*, L. R., 7 H. L. 269.) And however universal the custom may be to deliver goods to the owner at the place of destination, the parties may by their conduct waive it, and if they do the company will be discharged (*Strong* v. *Natally*, 1 B. & P., N. R. 16); as if the owner after the arrival of the goods requests the company to let them remain in their warehouse until he can conveniently send for them, and they are deposited and afterwards destroyed by fire, the duty of the company as carriers being at an end, they are not responsible for the loss in that character. (*In re Webb*, 8 Taunt. 443.) So if a man having no warehouse of his own, directs the company to leave the goods at their station until he should find it convenient to remove or sell them, the company's responsibility as carriers will terminate with the deposit. (*Richardson* v. *Goss*, 3 B. & P. 119.) And though the consignor order goods to be delivered at a particular place beyond the company's station, the company may deliver them (to be warehoused) at their station or any other place wherever they and the consignee

agree; and it makes no difference in this respect that the consignor cannot recover the price of the goods from the consignee in consequence of there being no acceptance by the latter within the Statute of Frauds. (*London and North Western Rail. Co.* v. *Bartlett, supra.*) In all cases of this description the material consideration is whether the owner of the goods has taken any exclusive possession of the goods, or has terminated the custody of the company by any act of direction which does not flow from their duty as carriers. (Story, Bail. ss. 541, 542.)

Delivery according to previous course of business.

Where in pursuance of general orders previously given (*London and North Western Rail. Co.* v. *Bartlett, supra*), or a course of dealing previously pursued (*Quiggin* v. *Duff*, 1 M. & W. 174; *Richardson* v. *Goss, supra*), the company have been accustomed to warehouse goods on their own premises, or upon the premises of a third person, the company are entitled to pursue that course until it is countermanded, and their liability will terminate when they have dealt with them in the usual way.

Goods "to be left till called for."

If goods are directed to a station, "to be left till called for," this amounts to an intimation that they will be fetched by the owner, and upon the expiration, after the arrival, of a reasonable time for the owner to demand and receive delivery, the company will cease to be liable as carriers. (*Chapman* v. *Great Western Rail. Co.*, 42 L. T., N. S. 252.)

Notice to remove, when a delivery.

Where, after goods reached the station to which they were consigned, the company sent a notice to the consignee to come and remove his goods, or

they would unload at his risk and expense, and the consignee sent a servant, who removed a small portion of the goods and gave directions to have the trucks placed on a siding near his premises, which was done. It was held that the notice to remove the goods amounted to a delivery, and that the consignee having had a reasonable time for removal, the duty of the company as common carriers was at an end. (*Bradshaw* v. *Irish North Western Rail. Co.*, 21 W. R. 581.)

Delivery of live stock.

Cattle are usually delivered to the consignee at the station to which they are consigned. It is not always easy, however, to determine at what stage the liability of the company as carriers is determined. Usually it will not determine until the cattle are unloaded from the carriages in which they have been conveyed. (*Moffat* v. *Great Western Rail. Co.*, 15 L. T., N. S. 630.) However, this rule has not always been observed. In *Wise* v. *Great Western Rail. Co.* (25 L. J., Ex. 258; 1 H. & N. 63), a horse was delivered to the company to be conveyed to W. for the plaintiff. On arrival at W., the company's servants either forgot or did not notice that the horse had arrived, and on the plaintiff calling for it the next day it was discovered in a horse-box on the siding, and found to be injured, from remaining all night in the cold and in a confined position. It was the usual and proper course for the sender to give an intimation to the consignee, and for some one to come to meet the horse at the end of the journey, and this had not been done. It was considered that (independently of the special contract in the case) the company would not have been liable, as the injury had

been the result of the plaintiff not being ready to receive the horse on its arrival at W. This case, however, seems in conflict with the general principles applicable to carriers.

Merely unloading cattle, even if the consignee or his servants are present and assisting, will not always determine the liability of the company. *Rooth* v. *North Eastern Rail. Co.* (36 L. J., Ex. 83; L. R., 2 Ex. 173), was an action for the non-delivery of cattle. The cattle arrived safely at C., to which they were consigned, and two servants of the plaintiff's assisted the company's servants in unloading, which was done at a siding where only one truck could be unloaded at a time. There was no pound to receive the cattle, and those which came out of one truck had to stand in the station yard while the truck behind was unloaded. While this was being done some of those which came out of the first truck strayed down the line and were killed by a passing engine. It was held that there had been no delivery. "What," says Channell, B., "is meant by delivery? There is not a delivery in fact because the person appointed to receive the cattle was in close proximity to the cattle after they left the truck. It would be a question for the jury, and the jury have found that, even though the cattle were, in a sense, delivered, they were not delivered in a safe and convenient place, and therefore there was no determination of the company's common law liability as common carriers." And, per Martin, B., "if the thing carried had been an inanimate thing, to be delivered into the hands of the person to whom it was sent, it might have been a different matter,

but these were cattle that were simply set loose upon the carriers' premises. It is a perfect fallacy to call that a delivery, so as to put an end to the liability of the railway company if the yard was not a safe place."

If, however, cattle are taken out of the trucks safely, and the consignee's servants are present to take possession of, and do take possession of, them and place them in a pen, although on the premises of the company, the liability of the company is at an end. In *Shepherd* v. *Bristol and Exeter Rail. Co.* (37 L. J., Ex. 113; L. R., 3 Ex. 189), the plaintiff sent cattle by the defendants' railway, intended for Islington Market. Had the train kept its time, the cattle would have arrived in London at seven on Sunday morning, but it did not reach there until noon. The plaintiff's servant was there when they arrived; but, as the police regulations prevented cattle being driven through the streets until midnight, they were, after being taken safely out of the trucks, placed in a pen at the station by the defendants' servants, assisted by the plaintiff's servant, where the plaintiff found them shortly after. They were fed by the plaintiff, and his servant was left in charge with directions to bring them away at midnight. After midnight, when the plaintiff's servant went to fetch them away, he found two dead, and the defendants' servants would not allow him to take the rest away unless he signed a receipt for the whole. Afterwards the plaintiff came himself and took them away. It was held that the defendants' liability as carriers was over before the damage occurred.

The company are bound to deliver to the right Delivery to

wrong person.

person, and are liable for delivering to a wrong person (*Hoare* v. *Great Western Rail. Co.*, 25 W. R. 631; *Youl* v. *Harbottle*, Peake, N. P. 49; *Duff* v. *Budd*, 3 B. & B. 177); even if, under a *bonâ fide* belief that they are delivering to the right person, they are induced to part with the goods to a wrong person, but under circumstances which ought to have excited the suspicion of a prudent man. (*Stephenson* v. *Hart*, 4 Bing. 476.) Where goods are consigned to an address, and no person of the name of the consignee is known there, the company should communicate with the consignor for further instructions before delivering them to anybody. (*Ib.*) So, if the goods are directed generally, as to "A. B., Exeter." (*Birkett* v. *Willan*, 2 B. & Ald. 356.) But where the usual course of business was for a carrier, on the arrival of goods at the place to which they were consigned, to send a notice to the address of the consignee requesting the goods to be removed, and stating that that notice must be produced by the person who has sent for the goods, indorsed as a delivery order; and this notice having been sent, it was afterwards produced so indorsed by a person who was not the intended consignee, whereupon the goods were delivered to him, it was held that the carrier was not liable as for a misdelivery, since, following his usual course of business, he had obeyed the directions given to him. (*M'Kean* v. *M'Iver*, 40 L. J., Ex. 30; L. R., 6 Ex. 36; and see *Heugh* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 48; L. R., 5 Ex. 51.)

SECT. 2.—*Delivery within a reasonable Time.*

Terms of an express contract binding, notwithstanding fulfilment is impossible.

If there is an express contract to deliver within a prescribed time, no temporary obstruction, or even the absolute impossibility of complying with the engagement, will be a defence to an action for failure in performing the contract. (*Robinson* v. *Dunmore*, 2 B. & P. 416; *Great Northern Rail. Co.* v. *Hawcroft*, 21 L. J., Q. B. 178.) And so wherever a railway company specially contract to deliver within a given time they may be sued for breach of the contract. (*Pickford* v. *Grand Junction Rail. Co.*, 12 M. & W. 766; and see *post*, Ch. XII.)

When no time is fixed, delivery must be within reasonable time.

If no particular time is fixed for delivery of goods, there is no rule of law requiring the company to carry within a specific time (*Donohoe* v. *London and North Western Rail. Co.*, 15 W. R. 792), but they are bound in all cases to make a proper delivery with reasonable expedition; for the duty to deliver within a reasonable time is a term engrafted by legal implication upon a promise or duty to carry generally. (*Raphael* v. *Pickford*, 5 M. & G. 558.)

This common law obligation, however, may be superseded by a special contract that the company are not to be held responsible for "delivery within any certain or definite time." (*Hughes* v. *Great Western Rail. Co.*, 23 L. J., C. P. 153; 14 C. B. 637.) But the implied contract to carry within a reasonable time can only be superseded by express stipulation. It creates a duty entirely distinct from the question of damage to the article itself

from accident on the journey, and a special contract to carry at "owner's risk" is no answer to a claim for not delivering within a reasonable time. (*Robinson* v. *Great Western Rail. Co.*, 35 L. J., C. P. 123.)

"Reasonable time" a question of fact.

What is "a reasonable time" may depend upon a variety of circumstances, such as the nature of the goods and the ordinary course of business of the company. (*Wren* v. *Eastern Counties Rail. Co.*, 1 L. T., N. S. 5.) And whether the company have used reasonable diligence and delivered within a reasonable time is a question of fact for a jury. (*Hales* v. *London and North Western Rail. Co.*, 32 L. J., Q. B. 292; 4 B. & S. 66.)

The usual course.

The sender is not entitled to call upon the company to go out of their ordinary accustomed course, or to have recourse to extraordinary means of despatch for the conveyance of goods, but he is entitled to expect them to do that which is within their means and power for transmitting goods. They are not bound to carry by the shortest route if that is not their custom, but they are bound to deliver within a reasonable time, having, of course, reference to the route by which they are carrying. (*Hales* v. *London and North Western Rail. Co.*, *supra.*) And if their ordinary course of business is inconsistent with reasonably early transit, it is no answer to an action for damages arising from delay that they carried at the ordinary rate at which they conducted their business. (*Blakemore* v. *Lancashire and Yorkshire Rail. Co.*, 1 F. & F. 76.)

Delay may

The Courts would take judicial notice of what

was the ordinary time employed in the transit and delivery of goods by a company. But the ordinary time for delivery, though *primâ facie*, is not necessarily equivalent to a reasonable time, for the first duty of a company is to carry safely, and they are justified in incurring delay when necessary to secure that. (*Great Northern Rail. Co.* v. *Taylor*, 35 L. J., C. P. 210; *S. C.*, *sub nom. Taylor* v. *Great Northern Rail. Co.*, L. R., 1 C. P. 385.)

be incurred where necessary for safety.

If the delay is caused by the act of God the company are not liable, if they use reasonable means to carry the goods to their destination; as where the delay is caused by a freshet sweeping away a railway bridge. (*Lipford* v. *Charlotte Rail. Co.*, 7 Rich. 409.) And if a snow storm occurs which makes it impossible to carry the goods without extraordinary efforts, involving additional expense, the company are not bound to use such means and incur such expense. (*Briddon* v. *Great Northern Rail. Co.*, 28 L. J., Ex. 51.) They are responsible only for the exertion of due diligence, and delay in delivery may be excused if caused by accident or misfortune, although not inevitable; as where the delay occurred by reason of an accident on the defendant's line, such accident being caused wholly by the negligence of another company which had running powers over the defendant's line. (*Great Northern Rail. Co.* v. *Taylor*, *supra*.) It is enough if the company use proper endeavours to prevent delay. In other words, the extraordinary responsibility of railway companies as common carriers does not require that that responsibility should be extended to the

Not liable for delay caused by the act of God,

or by accident, even if not inevitable.

time occupied in transportation. (*Hadley* v. *Clarke*, 8 T. R. 259.)

Delay caused by unusual influx of business.

If a railway company is well equipped and a delay is occasioned by an unusual influx of business beyond the immediate capacity of the road, and the goods are transported as expeditiously as possible in the then condition of the road and business, the company is not liable for delay (Angell on Carriers, 252); but if the influx is such that the company might have anticipated and made preparations for, they will be liable for an omission to do so. Thus in *Wallace* v. *Great Southern, &c. Rail. Co. of Ireland* (17 W. R. 464, Ir. Q. B.), the plaintiff on the 10th of Sept. delivered machinery at D. to the defendant company, to be delivered at W. The machinery was sent from D., and in the ordinary course of traffic would have reached W. on the 11th of Sept., but when it arrived at B., an intermediate station, the rails were in a slippery condition and a great increase of traffic had taken place there. The company's servants therefore uncoupled the trucks containing the plaintiff's machinery and substituted trucks which had been left behind by a previous train. The machinery was thus delayed, and arrived too late for the purpose it was intended for. The company had taken no precautions to provide for the extra traffic, though they might have anticipated it, and they were held liable for not delivering within a reasonable time. George, J., said "*The state of the rails* might have excused the company if they merely left behind at B. the wagons containing the machinery; but

as they substituted for these wagons certain other wagons, I think their conduct was not justifiable. Besides, they took no precautions to prepare for the additional traffic which they *might have anticipated* in consequence of there being a cattle fair at K."

If the company only profess to run trains for a certain class of traffic at stated intervals, it will be within a reasonable time if they carry in due course according to their profession; but in a case in which a company received cattle for carriage, and it did not appear that there were any ordinary cattle trains on the line, it was held to be properly left to the jury to say what was a reasonable time within which to convey the cattle, and therefore whether the company were bound to send them by a special train. (*Donohoe* v. *London and North Western Rail. Co.*, 15 W. R. 792.)

SECT. 3.—*Refusal of Consignee to receive.*

Tender for delivery, and refusal, determines company's contract as carriers.

When a company have carried goods to their destination and tendered them for delivery at the place to which they are addressed, where they are refused acceptance, the company have done all they contracted to do as carriers, and they become in the position of involuntary bailees, and that imposes upon them simply the duty of acting towards the goods as a reasonable and prudent man would act. (*Heugh* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 48; L. R., 5 Ex. 51.)

Duty of company after refusal.

The course which it may be necessary to pursue depends upon the nature of the goods, whether perishable or otherwise, bulky or in small compass, upon the facility of communication with the consignor, or owner, or his agents, and upon other local circumstances, as for example the accommodation for storing the goods at the place. It might be cattle which require to be fed, or fish, which twenty-four hours' detention would render valueless. There is no rule of law that the company must give notice to the consignor of the refusal of the consignee to receive, and though there are many cases in which it would be proper for them to do so, under particular circumstances there might be no negligence in abstaining from giving such notice. (*Hudson* v. *Baxendale*, 2 H. & N. 575; 27 L. J., Ex. 93.)

Not bound to give notice to the consignor.

Refused goods should be retained for a reasonable time at the place to which they were sent.

In general a refused parcel should be retained for a reasonable time, if there is convenience for doing so, at the place to which it is sent. Thus in *Crouch* v. *Great Western Rail. Co.* (27 L. J., Ex. 345; *S. C.*, *sub nom. Great Western Rail. Co.* v. *Crouch*, 3 H. & N. 183), a parcel was received by the company in London for delivery at Plymouth. The parcel was tendered to the consignee, who refused to receive it on the ground that the charge for carriage was excessive. On the following day he made application for it, tendering the sum demanded, but was informed that it had been sent back to London. The Court held, that this proceeding on the part of the company amounted to a breach of their duty of pursuing a reasonable line of conduct with reference to the circumstances, upon the parcel being declined.

Misdelivery after previous tender.

Where goods having been tendered by a company at the address of the consignees were refused acceptance, whereupon the company took them back to their own premises, and then (in accordance with their usual practice under such circumstances) sent by post an advice note to the consignees' address stating that the goods remained at the risk of the consignees, and would be delivered to the person producing the note. Subsequently they delivered the goods to a person who, having obtained the advice note fraudulently, produced it at the company's premises. It was held, that the company's duty as carriers having ceased, it was a question for the jury whether, under the circumstances, they had acted with due and reasonable care and diligence. (*Heugh* v. *London and North Western Rail. Co.*, *supra*; and see *Stephenson* v. *Hart*, 4 Bing. 476.)

When the consignee cannot be found.

When the consignee is dead, or after reasonable search and inquiry cannot be found, the company should retain the goods simply as warehousemen, until further instructions be received from the consignor.

CHAPTER VIII.

NON-DELIVERY AND PARTIAL LOSS, AND WHAT EXCUSES.

Proof of non-delivery.

In an action against a company for loss of goods it is sufficient evidence of non-delivery to show that the goods never reached the consignee. (*Gilbart* v. *Dale*, 5 A. & E. 547, per Coleridge, J.) In *Griffiths* v. *Lee* (1 C. & P. 110), the consignor stated that he gave the parcel in question to the carrier's servant properly addressed to the consignee: the consignee's servant stated that he did not know of the delivery and believed that the parcel could not have been delivered without his knowledge: it was held by Hullock, B., sufficient *primâ facie* evidence of non-delivery. It is necessary, in order to prove delivery by a company, to give evidence of an actual delivery into the possession of the consignee or his servants, though not necessary to show a delivery into their hands. (*Evans* v. *Bristol and Exeter Rail. Co.*, 10 W. R. 359.) Whether the circumstances amount to a delivery in any particular case would be wholly a question for a jury. (*Ib.*; *Quiggin* v. *Duff*, 1 M. & W. 174.)

Proof of partial loss.

So evidence that the weight or amount of goods delivered to the consignee is less than the weight or amount of goods delivered to the carrier is sufficient *primâ facie* to charge the latter for the deficiency, or to call on him to show that it did not

arise from his negligence. (*Hawkes* v. *Smith*, C. & M. 72.)

Proof of damage to goods.

In an action for damage caused by want of care in the carriage, proof that the goods were in a proper condition when received by the company, and were damaged when delivered, is sufficient. (*Higginbotham* v. *Great Northern Rail. Co.*, 10 W. R. 358.)

Non-delivery in condition received is *primâ facie* evidence of liability.

If goods are not delivered at their destination, or if when delivered they are not the same either in bulk, weight or condition as when received by the company, this is sufficient *primâ facie* evidence to make the company liable, and to throw on them the burden of showing, if they can, a legal excuse for this default in the primary obligation of carriers to deliver goods in the same condition in which they received them.

Presumption of liability how rebutted.

The company may rebut the presumption of liability by showing that the loss, injury or default in delivery arose from some peril from loss by which the company are by common law or statute exempt, or if the traffic was carried under a special contract, the company may show that they are exempt from liability by the terms of the contract.

We have previously seen what are the perils against which a common carrier is not an insurer (*ante*, p. 2). But it must be borne in mind that there is still a duty imposed on companies to carry safely even in cases where they are not insurers (*Marshall* v. *York, Newcastle, &c. Rail. Co.*, 11 C. B. 665, n., per Jervis, C. J.), and that nothing excuses loss or injury caused by a neglect of duty on their part. (*Ante*, p. 4.)

Act of God.

In order to come within the exemption from loss by the act of God, the loss need not have been caused directly and exclusively by such a violent, sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or (if he could foresee it) could not by any amount of care and skill resist so as to prevent its effects. It is sufficient to show that the effect of an act of nature could not have been prevented by any amount of foresight, pains and care *reasonably* to be required of the carrier. (*Nugent* v. *Smith*, 45 L. J., C. P. 697; L. R., 1 C. P. D. 423.)

The carrier is, however, bound as against all perils to do his utmost to protect the goods from loss or damage (*ib.*), and if an uncommon or unexpected danger arise he must use efforts proportioned to the emergency to ward it off. (*Leck* v. *Maestaer*, 1 Camp. 138.) If he fail to do so he remains liable although the so-called act of God may have been the immediate cause of the mischief.

The act of God must be the immediate cause of the mischief. If the immediate cause is the act of man, although not amounting to negligence, it will not be an excuse for injury to goods, notwithstanding the elementary forces of nature may have contributed to the misfortune. (*Oakley* v. *Portsmouth, &c. Steam Packet Co.*, 25 L. J., Ex. 99; 11 Ex. 618.)

Loss by fire.

Unless arising from lightning a company would be liable for damage caused by fire, although the fire did not arise on their own premises, and although they may have used all possible means to

prevent its spreading to their premises. (*Forward* v. *Pittard*, 1 T. R. 27.) Thus where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with inextinguishable violence, and extended itself to the hops and consumed them, without any neglect or default of the carrier, it was held that inasmuch as the fire had not been occasioned by lightning but by the act of man, the occurrence of the disaster constituted no answer to the action. (*Ib.*; *Hyde* v. *Trent and Mersey Navigation Co.*, 5 T. R. 389.)

Misconduct of a third person.

If the loss is occasioned by the misconduct of a third person, and not through any fault or neglect on the part of the company, the latter are nevertheless responsible to the owner, as they have themselves a remedy over against the offending party. (*Trent Navigation Co.* v. *Ward*, 3 Esp. 130.) But if the misconduct of the third person is caused by the orders of the owner of the goods, the company will not of course be responsible. (*Butterworth* v. *Brownlow*, 34 L. J., C. P. 267.)

Loss from the inherent nature of the thing carried.

The rule as to exemption from liability from the inherent nature of the thing carried has thus been stated and illustrated. A horse slips or falls, or kicks or plunges, or in some way hurts itself. If it does so from no cause other than its own inherent propensities—its "proper vice"—that is to say, from fright or temper, or struggling to keep its legs, the company are not liable. But if it so hurts itself from any act of negligence of the company, or from any misfortune happening to

the train, though not through any negligence of the company, as for instance from the horse-box leaving the line owing to some obstruction maliciously put on it, then the company as insurers would be liable. If perishable articles are injured through their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them or by an extraordinary shock or shaking, whether through negligence or not, the company are liable. (*Kendall* v. *London and South Western Rail. Co.*, 41 L. J., Ex. 184; L. R., 7 Ex. 373, per Bramwell, B.; *Nugent* v. *Smith*, *supra.*)

Negligence of the owner,

The company are not liable for injury or loss caused by the negligence of the owner or his servant, as where a man is sent in charge of cattle and they are killed by reason of his negligence. (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83; L. R., 2 Ex. 173, per Martin, B.)

or defect in the means of delivery supplied by him.

If by the course of dealing the owner of the goods supplies the means of delivery, and these means fail without default of the carrier, the latter is exonerated from loss thereby, as where a pipe of wine was broken in delivery by the giving way of a slid supplied by the owner. (*Nurrell* v. *Larkin*, 1 L. J., C. P. 2.)

Leakage.

Ordinarily a company would not be liable for leakage of casks, if the leakage arise from an inherent defect in the cask, or from the manner in which the bung-hole was stopped (*Hudson* v. *Baxendale*, 6 W. R. 83); but if during the journey the cask is perceived to be leaking, and the company's servants take no steps to prevent the leakage, the

company would be liable (*Beck* v. *Evans*, 16 East, 244); and in an action for injury to two casks of oil, alleged to have arisen from defects of the casks, it was left to the jury to say whether the loss arose from such defects, and whether, even if it did, the company knew or ought to have known thereof and had acted negligently in sending them on in that state. (*Cox* v. *London and North Western Rail. Co.*, 3 F. & F. 77.)

Defective packing.

If goods are improperly packed, and the company receive them only on the express condition that they are not to be responsible for improper packing, they will not be liable for injury the goods may suffer through not being properly packed. (*Barbour* v. *South Eastern Rail. Co.*, 34 L. T., N. S. 67.) And apart from any such condition, if the packing or securing is that usually adopted for goods of a like nature, and the company is led by the consignor to suppose that it is sufficient in the particular case, they will not be liable if it prove insufficient and injury or loss thereby results. (*Richardson* v. *North Eastern Rail. Co.*, 41 L. J., C. P. 60; L. R., 7 C. P. 74.) But inasmuch as a company may refuse to receive improperly-packed goods (*ante*, p. 15), or receive them only subject to conditions qualifying their liability, if they receive them without such qualification, and the defect is visible, they become liable if the goods are damaged, although partly through the packing, and the defective packing only goes in reduction of damages. (*Higginbotham* v. *Great Northern Rail. Co.*, 10 W. R. 358.) Carrying in a manifestly unsafe condition is carrying without due care. (*Ib.*) And where a dog was delivered

to a carrier, fastened only by a string, which was not sufficient to secure it, he was held liable for its loss because he had the means of seeing that the dog was not sufficiently secured. (*Stuart* v. *Crawley*, 2 Stark. 323; and see *Richardson* v. *North Eastern Rail. Co.*, *supra.*)

Fraud by the customer.

A company will not be liable for loss caused by the fraud of the customer, as where he does anything to disguise the nature of the goods (*Walker* v. *Jackson*, 10 M. & W. 161), or to lull the vigilance of the company by treating a valuable parcel as of no or only ordinary value (*Sleat* v. *Fagg*, 5 B. & Ald. 342), so as to prevent them from taking any particular care of it, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means the customer has adopted (*Bradley* v. *Waterhouse*, M. & M. 154) for the holding out by the consignor as an ordinary risk, what is in reality an extraordinary risk, is a legal fraud. (Per Bayley, J., *Batson* v. *Donovan*, 4 B. & Ald. 37.)

The Carriers' Act.

The company may rely for a defence upon the fact that the articles lost or injured are of the kinds mentioned in the Carriers' Act, and that the provisions of that statute have not been complied with (*ante*, p. 54), unless the loss has been by the felony of the company's servants. (*Ante*, p. 55.)

Stoppage *in transitu*, &c.

It is a sufficient excuse for non-delivery that the goods have been properly stopped *in transitu* by the consignor (*ante*, p. 93), or delivery countermanded by the consignor (*ante*, p. 92), or that they have been delivered to the real owner claiming adversely to the consignor. (*Ante*, p. 100.)

Goods received by company's servants contrary to usual course of business.

If the consignor has induced the company's servants to depart from their usual course of dealing, and to receive goods on terms and under circumstances different from those which the consignor knew they were authorized to receive them, the company will not be liable. (*Slim* v. *Great Northern Rail. Co.*, 23 L. J., C. P. 166; *Belfast and Ballymena Rail. Co.* v. *Keys*, 9 H. L. C. 556; *Edwards* v. *Sherratt*, 1 East, 604; and see *Harris* v. *Great Western Rail. Co.*, 45 L. J., Q. B. 737, per Blackburn, J.; *ante*, p. 43.)

Exemption by virtue of special contract.

Where a company claim to be exempt from liability by reason of their special contract with the consignor or owner, it must be shown (1) that the contract is in writing; (2) that it is just and reasonable in its terms (*ante*, p. 63); and, further (3) that the loss or injury is within the terms of the exemption.

Construction of contract.

A contract with a company is to be construed most strongly against the company as the maker of it. (*Mitchell* v. *Lancashire and Yorkshire Rail. Co.*, 44 L. J., Q. B. 107; L. R., 10 Q. B. 256; per Blackburn, J.)

The construction of the contract is a matter of law, and belongs to the Court alone, which must look at all the surrounding circumstances and the course of dealing between the parties, and then see what is the meaning of the terms employed when used in reference to those surrounding circumstances and the course of dealing. (*Lewis* v. *Great Western Rail. Co.*, 47 L. J., Q. B. 131; L. R., 3 Q. B. D. 45, per Bramwell, L. J.; *Peek* v. *North Staffordshire Rail. Co.*, 32 L. J., Q. B. 241; 10 H. L. C. 473.) The special circumstances, if any,

are to be ascertained as facts by the jury. (*Ib.*; *Neilson* v. *Harford*, 8 M. & W. 823, per Parke, B.) Thus, where goods were received to be carried at "owner's risk," the facts found were that in a previous course of dealing between the same parties, goods had been carried for the consignor upon the terms of a consignment note, on which were the words "owners' risk," and contained conditions, one of which was, that the company was absolved from all liability for loss or damage not caused by the wilful misconduct of the company's servants, and it was held that in delivering goods to be carried at "owners' risk," the consignor had delivered them to be carried on the terms of this consignment note. (*Lewis* v. *Great Western Rail. Co.*, *supra.*)

Contract will not relieve from loss by negligence.

A special contract will not be construed to exempt the company from even the excepted perils when the negligence of the company contributed to the loss by the excepted perils. Thus, a condition relieving against injury in the delivery of cattle occasioned by the restiveness of the animals, was held no defence where, although the injury was caused by the restiveness of the animals, the company had not used reasonable precaution to guard against the consequences of such restiveness. (*Gill* v. *Manchester, Sheffield, &c. Rail. Co.*, 42 L. J., Q. B. 89; L. R., 8 Q. B. 186.) So, if the injury arose from the defects of the station. (*Rooth* v. *North Eastern Rail. Co.*, 36 L. J., Ex. 83; L. R., 2 Ex. 173.) And a stipulation that the company shall not be liable for leakage or breakage will not relieve them from such damage or loss caused by their own neglect. (*Phillips* v. *Clark*, 26 L. J, C. P. 168; 2 C. B., N. S. 156.)

A contract relating to one matter will not be construed to relieve the company from loss from an entirely distinct matter. Thus, a contract to carry at "owner's risk," means that whatever happens on the journey is to be at the owner's risk, and does not relieve the company from liability under their implied independent contract to carry and deliver within a reasonable time. (*Robinson* v. *Great Western Rail. Co.*, 35 L. J., C. P. 127; *D'Arc* v. *London and North Western Rail. Co.*, L. R., 9 C. P. 325.)

Onus of proof.

Where by their contract the company are to be liable only for negligence, the onus of proving negligence lies on the plaintiff. (*Harris* v. *Midland Rail. Co.*, 25 W. R. 63.) So if the company contract that they will not be liable "except upon proof that the loss, damage or delay arose from the wilful misconduct of the company's servants," it is necessary to give affirmative evidence of such misconduct; it cannot be inferred. (*Lewis* v. *Great Western Rail. Co.*, L. R., 3 Q. B. D. 45; *Great Western Rail. Co.* v. *Glenister*, 22 W. R. 72; *Webb* v. *Great Western Rail. Co.*, 26 W. R. 111; *Haynes* v. *Great Western Rail. Co.*, 41 L. T., N. S. 436.) It would be wilful misconduct if the goods were put in a truck not proper for the conveyance of the goods (*Lewis* v. *Great Western Rail. Co.*, *supra*, per Bramwell, L. J.), or if it is brought to the notice of the company's servant that he is doing or omitting to do something which may seriously endanger the goods, and he persists in doing that which he has been warned not to do (*ib.*, per Brett, L. J.). So

"Wilful misconduct."

where the company's servants intentionally deliver to the wrong person. (*Hoare* v. *Great Western Rail. Co.*, 25 W. R. 631.) But improper packing, where it was not shown that the packers knew they were packing them in a manner likely to damage the goods, but they simply did not take the trouble to inform themselves whether or not damage would result from the packing (*Lewis* v. *Great Western Rail. Co.*, *supra*), negligence in allowing cattle to stray on the line after they were unloaded (*Great Western Rail. Co.* v. *Glenister*, *supra*), loading goods on a truck too high to pass under the bridges of another railway company, by reason of which the truck was delayed, to do acts necessary to enable it so to pass (*Webb* v. *Great Western Rail. Co.*, *supra*), and placing horse rakes on a truck shorter than themselves, it not being proved that this was in itself the cause of injury (*Haynes* v. *Great Western Rail. Co.*, *supra*), have been held not to amount to "wilful misconduct."

CHAPTER IX.

GOODS RETAINED BY THE COMPANY AS WAREHOUSEMEN.

Company having fulfilled their contract to carry,

WHEN a company have done everything they expressly or impliedly undertook to do under the contract to carry, their responsibility as carriers is at end (*ante*, p. 104); and although the goods remain in their possession, it is upon the terms of a much less degree of responsibility.

may remain liable as warehousemen.

If goods, after being carried, are tendered at the residence of the consignee and refused, they remain in the hands of the company as involuntary bailees. (*Heugh* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 48; L. R., 5 Ex. 51; *Storr* v. *Crowley*, M'Cle. & Y. 129.) If the goods are received into the warehouse of the company to await future orders of the owner, the company are clothed only with the duties and responsibilities of a warehouseman or bailee for hire. (*Cairns* v. *Robins*, 8 M. & W. 258.) And so where goods are in accordance with previous usage retained after the transit at the warehouse of the company until they are removed by the consignor, and for his convenience, the company hold them as warehousemen only. (*Garside* v. *Trent Navigation Co.*, 4 T. R. 581; *Re Webb*, 8 Taunt. 443.) Where goods are addressed to a station "to be left till

called for," upon the expiration of a reasonable time after arrival, the company are liable for them only as warehousemen. (*Chapman* v. *Great Western Rail. Co.*, 42 L. T., N. S. 252; 28 W. R. 566.) Goods received at the cloak-room of a railway company are not received by them in the capacity of carriers but simply as bailees for hire. (*Van Toll* v. *South Eastern Rail. Co.*, 31 L. J., C. P. 241; 12 C. B., N. S. 75.)

As warehousemen, company not gratuitous bailees.

A company acting as warehousemen of goods to await the future orders of the owner either before or after the transit has finished, although no charge is made for warehousing, are not generally to be considered as mere gratuitous bailees, but as bailees for hire, since the remuneration for carrying may be considered as a general remuneration not only for carrying but for warehouse rent also. (*White* v. *Humphery*, 11 Q. B. 43; *Cairns* v. *Robins*, *supra*.)

Duty and liability of a warehouseman.

A warehouseman is not, like a carrier, an insurer. (*Searle* v. *Laverick*, 43 L. J., Q. B. 43; L. R., 9 Q. B. 122.) He is only bound to take the ordinary care of things intrusted to him to keep, which a reasonably prudent man takes of his own property of a like description. (*Giblin* v. *M'Mullen*, 38 L. J., P. C. 25; L. R., 2 P. C. 317; *Heugh* v. *London and North Western Rail. Co.*, *supra*; *Harris* v. *Great Western Rail. Co.*, 45 L. J., Q. B. 739, per Lush, J.; Story, Bail. s. 444.) Therefore if goods are injured or destroyed by rats while in his custody, he is not responsible if he has exercised ordinary care in their preservation (*Cailiff* v. *Danvers*, Peake, 114); so if they are stolen (*Finucane* v. *Small*, 1 Esp. 315), or destroyed

by accidental fire (*Garside* v. *Trent Navigation Co.*, *supra*; *Chapman* v. *Great Western Rail. Co.*, 28 W. R. 566), or other casualty, without negligence on his part, but it has been said that in case of loss it lies on him to acquit himself by showing that he was not in fault. (*Mackenzie* v. *Cox*, 9 C. & P. 632, per Gurney, B.)

Warehouseman may receive only upon special contract,

But a company are not bound to receive goods into their warehouse upon the ordinary liability of warehousemen. In a contract of bailment the bailee may impose whatever terms he chooses, and if he gives notice of them and the bailor has the means of knowing them, and he then chooses to make the bailment, he is bound by them. The reasonableness of the terms is an irrelevant inquiry. It is not a carrier's contract (*Van Toll* v. *South Eastern Rail. Co.*, *supra*, per Erle, C. J.; *Harris* v. *Great Western Rail. Co.*, 45 L. J., Q. B. 729; L. R., 1 Q. B. D. 515), and does not require to be in writing. Where a railway company, on the arrival of goods at one of their stations, gave notice to the consignee that they held the goods "not as common carriers but as warehousemen at owners' sole risk, and subject to the usual warehouse charges," in which notice the consignee acquiesced, it was held upon the construction of the terms of this notice, that it did not qualify the duty of the company as warehousemen, and free them from the ordinary liability to take reasonable care, and that they were therefore liable for damage happening through their negligence. (*Mitchell* v. *Lancashire and Yorkshire Rail. Co.*, 44 L. J., Q. B. 107; L. R., 10 Q. B. 256.)

which need not be in writing.

Measure of damages.

Upon the loss of an article in the possession of the company as warehousemen, the measure of damages is the value of the article itself, and not consequential damages resulting from its loss. (*Henderson* v. *North Eastern Rail. Co.*, 9 W. R. 519.) And for a mis-delivery, amounting technically to a conversion, the company will only be liable for nominal damages, if no actual damage has been sustained. (*Hiort* v. *London and North Western Rail. Co.*, 27 W. R. 778; 48 L. J., Ex. 545; L. R., 4 Ex. D. 188.)

CHAPTER X.

PASSENGERS' LUGGAGE.

Company bound to carry with passenger a certain weight of luggage free of charge.

PASSENGERS by railways are accustomed as of right to take a certain specified quantity of luggage, for which no charge is made, in addition to the fare of the passenger. The special act of each company usually specifies the quantity allowed, varying with the class by which the passenger travels.

The 7 & 8 Vict. c. 85, s. 6, which compels companies to provide one parliamentary or cheap train each way daily, enacts that "each passenger by such train shall be allowed to take with him half-a hundred weight of luggage, not being merchandise or other articles carried for hire or profit, without extra charge; and any excess of luggage shall be charged by weight, at a rate not exceeding the lowest rate of charge for passengers' luggage by other trains." Upon which it has been decided that a husband and wife travelling together are entitled to carry one hundredweight between them, irrespective of the quantities in which it belongs to each. (*Great Northern Rail. Co.* v. *Shepherd*, 21 L. J., Ex. 114; 8 Ex. 30.) If the company choose to allow the passenger to take more than the regulated quantity, they will be liable for the excess. (*Ib.*)

Not bound

A company may, however, issue cheap excursion

to take luggage by excursion trains.

tickets, subject to a condition that no luggage will be allowed. If a person take such a ticket, and nevertheless take luggage with him, the company can exact payment for carrying it. (*Rumsey* v. *North Eastern Rail. Co.*, 32 L. J., C. P. 244; 14 C. B., N. S. 641.)

Of luggage carried free, companies are common carriers,

We have seen (*ante*, p. 5) that as regards passengers' luggage railway companies incur the ordinary liability, and are entitled to the exemptions of common carriers of goods. The various rules already laid down with reference to the liability of companies as carriers of goods generally, are therefore applicable in considering the liability of companies for loss of or injury to the luggage of passengers carried on the railway. This, however, only applies to "personal luggage," and to luggage which is placed under the actual control of the company's servants.

but only of "personal luggage," and when placed under their control.

Liability in respect of luggage only limited by signed contracts.

The Carriers' Act (*ante*, p. 45) applies to passengers' luggage (see *Macrow* v. *Great Western Rail. Co.*, *post*, p. 137), and such luggage is within sect. 7 of the Railway and Canal Traffic Act, 1854 (*ante*, p. 62); and therefore conditions made by a railway company for the purpose of limiting their liability for loss of or injury to the luggage of a passenger must be just and reasonable and contained in a special contract, signed by the passenger or by the person delivering such luggage to the company for carriage (*Cohen* v. *South Eastern Rail. Co.*, 45 L. J., Ex. 298; 46 *ib.* 417; L. R., 1 Ex. D. 217; 2 *ib.* 253); and this applies not only to carriage by railway, but also to carriage by steam vessels. (*Ib.*) This case in effect

overrules *Stewart* v. *London and North Western Rail. Co.* (33 L. J., Ex. 199; 3 H. & C. 135), in which a company issued cheap excursion tickets, subject to a condition, allowing passengers to take a small quantity of luggage free of charge "at passenger's own risk." This condition was not signed by the passenger, but was nevertheless held binding upon him.

Personal luggage defined.

We have stated that the liability of the company attaches only in respect of "personal luggage." The question then is what is such? Mr. Justice Lush admits, that "it would be very difficult, perhaps impossible, to frame a definition which would be suitable in every possible exigency" (*Hudston* v. *Midland Rail. Co.*, 38 L. J., Q. B. 213; L. R., 4 Q. B. 366); but later Cockburn, C. J., in *Macrow* v. *Great Western Rail. Co.* (40 L. J., Q. B. 300; L. R., 6 Q. B. 612), after reviewing the authorities says:—"We hold the true rule to be, that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities, or the ultimate purpose of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament,—leaving the carrier herein to the protection of the Carriers' Act, to which, being held to be liable in respect of passengers' luggage as a carrier of goods, he undoubtedly becomes entitled—but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketch-

ing tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage unless accepted as such by the carrier."

Illustrations of what are and what are not personal luggage.

Thus, though a pair of sheets or the like, taken by a passenger for use on the journey, might be considered "personal luggage," a quantity of articles of this description for the use of the passenger's family when permanently settled, could not be so considered (*Macrow* v. *Great Western Rail. Co.*, *supra*); and though a small toy or present to a member of the family which the passenger is visiting might be considered as passenger's luggage (*Great Northern Rail. Co.* v. *Shepherd*, 21 L. J., Ex. 286; 8 Ex. 30), a toy or present may be of such a size and shape as not to be reasonably considered as such; as, for example, a child's rocking-horse 44 inches in length, and weighing 78 pounds. (*Hudston* v. *Midland Rail. Co.*, 38 L. J., Q. B. 213; L. R., 4 Q. B. 366.) It seems, also, that articles carried by one person as agent for another cannot be considered personal luggage, as in the case of a solicitor carrying in his portmanteau the title deeds of a

client to produce at a trial, and bank notes to meet the result of the trial. (*Phelps* v. *London and North Western Rail. Co.*, 34 L. J., C. P. 259; 19 C. B., N. S. 321.) And Byles, J., doubted whether a man's own title deeds and securities could be considered personal luggage. (*Ib.*)

Merchandise.

Articles of merchandise, that is, things intended for sale, or where the person who carries them makes a profit out of them, are not personal luggage, although the articles themselves might, under other circumstances, come under the definition. (*Hudston* v. *Midland Rail. Co.*, *supra*, per Lush, J.; *Cahill* v. *London and North Western Rail. Co.*, 31 L. J., C. P. 271; 13 C. B., N. S. 818; *Great Northern Rail. Co.* v. *Shepherd*, *supra*; *Belfast and Ballymena Rail. Co.* v. *Keys*, 9 H. L. C. 556.)

Company taking goods known not to be personal luggage are liable,

but must have actual knowledge.

If the company have notice that the goods taken with the passenger are not personal luggage—as where the articles are exposed—and they choose to take them as luggage, they will be responsible. (See *Great Northern Rail. Co.* v. *Shepherd*, *supra*.) It will not, however, be sufficient to render the company liable, that their servants might have suspected or believed from the external appearance of the package that it contained merchandise; there must be facts from which the knowledge of the company's servants can be inferred; the mere fact that a package looks like merchandise, and is labelled "glass," is not enough. (*Cahill* v. *London and North Western Rail. Co.*, *supra*.)

Liable only for passen-

A company is liable only for the luggage of the passenger with whom it is carried. Therefore, it

gers' own luggage.

was held that a master could not sue for the loss of his portmanteau which his servant took by train as his own personal luggage, the master coming by a later train the same day. (*Becher* v. *Great Eastern Rail. Co.*, 39 L. J., Q. B. 122; L. R., 5 Q. B. 241.) But it is immaterial who pays the passenger's fare: if it is paid the company is liable for his luggage, so that a servant travelling with his master may sue for the loss of his luggage, though the master took and paid for his ticket. (*Marshall* v. *York, Newcastle, &c. Rail. Co.*, 21 L. J., C. P. 34; 11 C. B. 655.)

Luggage given into charge of company.

The liability certainly attaches to luggage given into the charge of the company's servants to be carried in the company's ordinary luggage van (*Cohen* v. *South Eastern Rail. Co.*, 24 W. R. 522), and the company have no right to refuse to take into their charge a parcel of luggage within the prescribed weight, properly packed. If the passenger wishes the company to take such a parcel into their charge, they are bound to do so. They may put it where they please in the train, but if they put it in the carriage with the passenger, it does not absolve them from liability, and they have no right to compel the passenger to take it in the carriage with him at his own risk. (*Munster* v. *South Eastern Rail. Co.*, 27 L. J., C. P. 308; 4 C. B., N. S. 676.)

Luggage retained by passenger in his own charge.

If, however, at *the passenger's request*, the luggage is put in the carriage in which he travels or intends to travel, the company then are liable only for loss caused by their negligence (*Bergheim* v. *Great Eastern Rail. Co.*, 47 L. J., C. P. 318;

L. R., 3 C. P. D. 221; *Talley* v. *Great Western Rail. Co.*, 40 L. J., C. P. 9; L. R., 6 C. P. 44; but see *Le Couteur* v. *London and South Western Rail. Co.*, 35 L. J., Q. B. 40; L. R., 1 Q. B. 54); but even if the passenger is going to take the luggage with him in the carriage, yet if he deliver it to a porter to place in the carriage, the company are liable until it is actually so placed. (*Leach* v. *South Eastern Rail. Co.*, 34 L. T., N. S. 134.)

Commencement of liability.

The liability of the company extends not merely to the actual transit on the line, but from the moment when luggage is placed under the control of one of their porters for the purpose of putting it in transit. (*Lovell* v. *London, Chatham, &c. Rail. Co.*, 45 L. J., Q. B. 476; 24 W. R. 394.) It is not necessary the intending passenger should have taken a ticket, or that the luggage should be labelled, but he must have given directions for it to be placed in transit. If an intending passenger, on arriving at a station, give his portmanteau to a porter, saying, "Hull," and the porter answers "All right!" this would, it seems, attach to the company their liability as carriers; but if the luggage is given to the porter and nothing said on either side, the company is not liable if, before directions are given to place the luggage in transit, it is lost. (*Agrell* v. *London and North Western Rail. Co.*, 34 L. T., N. S. 134, n., per Pollock, B.)

Termination of liability.

The liability is not determined by the termination of the transit, but continues until the passenger resumes or has an opportunity of resuming exclusive control over the luggage. Taking it out of the van and putting it on the platform is not

delivery, but the company continue liable for such a reasonable period as would enable the passenger to claim it and take it away. (*Patscheider* v. *Great Western Rail. Co.*, L. R., 3 Ex. D. 153; 26 W. R. 268.) If the company, for the convenience of passengers, have porters who are accustomed to carry luggage to cabs or other vehicles, the liability of the company continues until the luggage is placed in the vehicle, and that whether the luggage was carried in the van or in the carriage with the passenger. (*Richards* v. *London and South Coast Rail. Co.*, 18 L. J., C. P. 251; 7 C. B. 839; *Butcher* v. *London and South Western Rail. Co.*, 24 L. J., C. P. 137; 16 C. B. 13.) And where a company stipulate that they shall not be liable for loss of luggage arising off their line, they can only free themselves by showing that it was not lost until it had passed out of the custody of their porters. (*Kent* v. *Midland Rail. Co.*, 44 L. J., Q. B. 18; L. R., 10 Q. B. 1.)

Luggage left in cloak-room.

For luggage left at a "cloak-room," or "left-luggage office," railway companies are only liable as ordinary warehousemen. (*Ante*, p. 132.) This liability is usually further limited by the conditions printed on the ticket given to the depositor at the time. If the depositor is not aware that there are any conditions they are not binding upon him. (*Henderson* v. *Stevenson*, L. R., 2 Sc. App. 470.) If he knows there is writing, and knows or believes that the writing contains conditions, then he is bound by them; if he knows there is writing, but does not know or believe that the writing contains conditions, nevertheless he will be bound if the de-

livering the ticket to him in such a manner that he could see that there was writing upon it, is, in the opinion of the jury, reasonable notice that the writing contains conditions. (*Parker* v. *South Eastern Rail. Co.*, 46 L. J., C. P. 768; L. R., 2 C. P. D. 416; *Harris* v. *Great Western Rail. Co.*, 45 L. J., Q. B. 729; L. R., 1 Q. B. D. 515.)

CHAPTER XI.

ACTIONS AGAINST AND BY COMPANIES.

We have seen that railways are bound to receive and carry, according to their public profession, the goods of all persons on equal terms. If they refuse to do so, an action would lie against them for such refusal. (*Pickford* v. *Grand Junction Rail. Co.*, 10 M. & W. 399.)

Action for refusal to carry,

for loss, damage, &c.

Assuming the goods to have been received for carriage, but to have been lost or damaged, or to have been unreasonably delayed in the delivery, and such loss or delay is not excused on any of the grounds mentioned in Chapter VIII., the owner of the goods has his remedy by action against the company.

Who may sue.

It is sometimes difficult to determine who is the proper person to sue. The general rule is (1) that the proper person to sue the carrier is the person who employs him, and (2) that in the absence of an express contract it is presumed the carrier is employed by the person at whose risk the goods are carried, that is, the person whose goods they are, and who would suffer if they were lost. (Dicey, Parties to Action, 87.) This will often depend upon whether or not there has been a valid contract of sale between the consignor and consignee.

When goods have been purchased under a contract of sale by the consignee from the consignor, the latter on delivering them to the carrier acts merely as the agent of the consignee to retain the carrier, and delivery to the carrier operates as delivery to the consignee, at whose risk they are carried, and he is the proper person to sue. (*Dawes* v. *Peck*, 8 T. R. 330; *Cork Distillery Co.* v. *Great Southern and Western Rail. Co.*, L. R., 7 H. L. 269.) Nor will the mere fact of payment of carriage on the goods by the consignor prevent the property and risk passing to the consignee. (*King* v. *Meredith*, 2 Camp. 639.)

Consignee, when the property is in him.

If there has been no contract of sale, and the property in the goods remains in the consignor, he will be the proper person to sue, for he is the person at whose risk they are, and, therefore, is presumed to have employed the carrier. Such is the case where goods are sent on approval (*Swain* v. *Shepherd*, 1 M. & Rob. 223), or where the sale is not binding on the consignee by reason of the Statute of Frauds. (*Coates* v. *Chaplin*, 3 Q. B. 483; 11 L. J., Q. B. 315; *Coombs* v. *Bristol and Exeter Rail. Co.*, 27 L. J., Ex. 401; 3 H. & N. 510.) And where goods are delivered to the wrong person and not to the consignee, the property remains in the consignor, and he is the proper person to maintain an action. (*Hoare* v. *Great Western Rail. Co.*, 37 L. T., N. S. 186; 25 W. R. 631.) So where goods are directed to a consignee who cannot be found. And where a fraudulent order for goods was sent to a firm in M., purporting to come from a company which had given no authority for the

Consignor, when property remains in him.

order, and the goods were forwarded to the consignee's address and there refused, it was held, that there had been no sale, and that the property in the goods remained in the consignors, who could maintain an action in respect thereof. (*Heugh* v. *London and North Western Rail. Co.*, 39 L. J., Ex. 48; L. R., 5 Ex. 51.)

Special contract may determine right to sue.

But the right to sue may be regulated by a special contract relating to the carriage and made between the consignor and consignee, or between either of those parties and the carrier. If the consignor undertakes with the consignee to deliver the goods to him at the termination of the transit, the consignee has nothing to do with the employment of the carrier, the risk is not his, and, irrespective of any question as to the property in the goods, the consignor is the person to sue. (*Dunlop* v. *Lambert*, 6 Cl. & F. 600.) And, again, where the carrier expressly agrees with the consignor to be liable to the consignor in consideration of his undertaking to pay for the carriage, the consignor may maintain the action. (*Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659.) So in the case of a consignee, although the property in the goods may not have passed to him by reason of the Statute of Frauds, yet if he has contracted with the carrier for their carriage, he may sue for damages to them. (*Mead* v. *South Eastern Rail. Co.*, 18 W. R. 735.)

Joint action for separate properties.

Where a single box, containing the separate property of A. and B. is delivered to the company by a joint agent, A. and B. may join in the action. (*Metcalfe* v. *London, Brighton, &c. Rail. Co.*, 27 L. J., C. P. 333; 4 C. B., N. S. 317.)

Person having a special property.

A special property in goods is sufficient to support an action in respect thereof. Thus, a laundress may sue a carrier who loses the linen returned by her through him. (*Freeman* v. *Birch*, 3 Q. B. 492, n.)

In cases where the cause of action is loss through delay in the transit, the person damnified should bring the action.

Special contract should be sued upon.

In all cases it is important to ascertain whether or not there is a special contract between the company and one of the parties. If so, the party to the contract should sue upon it for the alleged breach.

Company to be sued.

The company to be sued will be the company which contracted to carry safely, that is, the company by which the goods were first received to be put in transit, notwithstanding that to reach their destination they have to pass over other lines, and though the cause of action may have arisen on such other lines (*ante*, p. 9).

Actions by companies.

The same principles that are applicable to actions against companies, will apply where a company have to bring an action to recover the amount of their charges for carriage. The company to sue will be the company with whom the contract was made; and the person to be sued will be the person who might have sued the company, if they had failed to deliver the goods.

Actions in superior court.

The form of action, whether in contract or tort, will of course depend upon the facts. If the action is in the Superior Court, it will be material to the plaintiff, in view of the question of costs, that it should, if possible, be shaped in tort.

Costs of as affected by 30 & 31 Vict. c. 142.

The County Court Act, 1867 (30 & 31 Vict. c. 142), s. 5, enacts, that "If in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of record, the plaintiff shall *recover* a sum not exceeding 20*l.*, if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

Amount recovered governs right to costs.

The test as to amount is what the plaintiff "recovers," and not what he sues for. (*Chatfield* v. *Sedgwick*, 27 W. R. 790.) If the plaintiff's claim is below 50*l.* (so that it could be brought in the County Court), and it is reduced by a counter-claim proved by the defendants, the question of costs under the above section is to be determined with reference to the balance recovered (*Staples* v. *Young*, 25 W. R. 304; L. R., 2 Ex. D. 324); but where the plaintiff's claim exceeds 50*l.*, and he recovers a sum exceeding 20*l.*, he will not be deprived of his costs on the ground that the defendant has succeeded on a set-off and counter-claim, so as to reduce the amount actually recovered as the balance to less than 20*l.* (*Potter* v. *Chambers*, 48 L. J., Q. B. 274; *Neale* v. *Clarke*, 41 L. T., N. S. 438; and see *Cole* v. *Firth*, 40 L. T., N. S. 851.)

Action, when it is in con-

To determine whether an action is founded upon contract or tort, depends upon the substance of the

claim, and not on the form of the pleadings. It is decided by the answer to the question, what is the foundation of the action, and what facts are necessary to be stated and proved in order to maintain it? (*Bryant* v. *Herbert*, L. R., 3 C. P. D. 389; 47 L. J., C. P. 670.) If the claim is against a railway company in respect of injury sustained in relation to goods while they were in the custody of the company as carriers, and before they were properly delivered, the substance of the action is the breach of the contract to carry safely. (*Fleming* v. *Manchester, Sheffield, &c. Rail. Co.*, L. R., 4 Q. B. D. 81; 39 L. T., N. S. 555.) But if the ground of action is something done by the company after the contract to carry and deliver has been put an end to (as by the consignor exercising his right of stoppage *in transitu*), the action is in respect of a tort. (*Pontifex* v. *Midland Rail. Co.*, L. R., 3 Q. B. D. 23; 37 L. T., N. S. 403.) tract, and when in tort.

Where the amount of the claim does not exceed 50*l.*, the action may be brought in the County Court. Actions in County Court.

A plaint may be entered in the County Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of bringing the action or suit, or it may be entered, by leave of the judge or registrar in the County Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of action or suit brought, or, with the like leave in the Where summons may issue.

County Court in the district of which the cause of action or suit wholly or in part arose. (30 & 31 Vict. c. 142, s. 1.)

Dwelling-place or place of business of a company.

A railway company is to be deemed to dwell and carry on business only at the principal office, and not at every station on the line (*Adams* v. *Great Western Rail. Co.*, 30 L. J., Ex. 124; *Shiels* v. *Great Northern Rail. Co.*, *Ib.*, Q. B. 331; *Brown* v. *London and North Western Rail. Co.*, 32 L. J., Q. B. 318; 4 B. & S. 327), or at a receiving office for parcels which is conducted by an agent. (*Minor* v. *London and North Western Rail. Co.*, 26 L. J., C. P. 39; 1 C. B., N. S. 325.) The Great Western Railway Company, therefore, dwells and carries on business at Paddington, the Great Northern at King's Cross, and the London and North Western at Euston.

Action in district where cause of action arose.

It will be noticed that a plaintiff is not obliged to bring the action in the district where the company carries on business, but by leave of the registrar a summons may issue, and the action be tried in the district in which the cause of action wholly or in part arose. Where goods are delivered for carriage at a station in one district to be safely carried and delivered at a station within another district, and there is a breach of the contract, then, since the contract is made in one, and the breach of it in another district, the cause of action may be said to have partly arisen in both, and the action may be brought in either district. (See *Green* v. *Beach*, 42 L. J., Ex. 151; L. R., 8 Ex. 208; *Gold* v. *Turner*, 23 W. R. 732.)

Trial by jury.

In all actions where the amount claimed shall

exceed 5*l.*, either party may require the action to be tried by a jury, and in actions under 5*l.*, the judge may, in his discretion, on the application of either of the parties, order that the action be tried by a jury. (9 & 10 Vict. c. 95, s. 70.) When an action is tried before a jury, costs follow the event, unless an order is made to the contrary. (*King* v. *Hawkesworth*, 27 W. R. 660; L. R., 4 Q. B. D. 371.)

Appeal,

Where the amount claimed in the plaint exceeds 20*l.*, either party may of right appeal from the decision of the judge on a point of law, although the amount recovered is less than 20*l.* (13 & 14 Vict. c. 61, s. 14; *Harris* v. *Dreesman*, 23 L. J., Ex. 210; 9 Ex. 485.) Where the amount claimed is under 20*l.* an appeal will not lie without the leave of the judge.

only on point of law.

The right of appeal is confined to questions of law. There is no appeal on a question of fact.

The appeal may be either by a special case or by motion to the Divisional Court assigned to hear such appeals. Hitherto, on account of the difficulties surrounding it, this latter form of appeal has not been a generally satisfactory one.

Special case.

When the appeal is by special case, notice of appeal in writing, signed by the appellant or his solicitor, must, within ten days, exclusive of the day of trial, be given to the successful party or his solicitor, stating the grounds of appeal, though the appellant is not restricted to the grounds of appeal actually stated. (13 & 14 Vict. c. 61, s. 14; County Court Orders, 1875; Ord. XXIX. rules 1—3.)

Motion.

Where the appeal is by motion, the motion must be made within eight days (*Wilberforce* v. *Sowton*, 48 L. J., C. P. 28), after the decision. (38 & 39 Vict. c. 50, s. 6.) No notice of appeal is necessary. But at the trial below the judge must, at request of either party, make a note of any question of law raised at the trial, and of his decision, and shall, at the cost of the person requiring the same for the purpose of appeal, furnish or allow to be taken a copy of the same, which shall be used at the hearing of the appeal (*Ib.*); though it has been held that the Court may, if it think fit, dispense with a copy of the judge's notes. (*Morgan* v. *Davies*, 39 L. T., N. S. 60.) But there can be no appeal by motion if the judge is not requested, before the trial is over, to take a note. (*Pierpoint* v. *Cartwright*, 28 W. R. 583.) Whether by special case or motion, the appeal can only be on a question of law. (*Cousens* v. *London Deposit Bank*, 45 L. J., C. P. 573; L. R., 1 Ex. D. 404.)

CHAPTER XII.

THE DAMAGES RECOVERABLE.

A CLAIM for damages may arise (1) when the company have received goods and never delivered them; or (2) delivered them in a damaged or deteriorated condition; or (3) have not delivered them within the time which they expressly or impliedly undertook to do. The two former are called actual loss, the latter consequential loss.

Actual loss.

If the goods themselves are lost, or delivered in such a condition as to be valueless, the owner is entitled to recover their value. *Primâ facie* their actual and intrinsic value at the time of delivery to the company, and not any fancy value which the owner may set upon the goods, is the amount recoverable.

Real and not fancy value recoverable.

Market value at place of consignment.

As to articles of commerce, the amount recoverable is the market value of the goods at the place to which they were consigned, as distinguished from the place at which they were delivered to the company (*Rice* v. *Baxendale*, 30 L. J., Ex. 371; 7 H. & N. 96), at the time they ought to have reached their destination (*Brandt* v. *Bowlby*, 2 B. & Ad. 932), first deducting from the amount the amount of the carriage, unless it has been paid in advance. If this test is inapplicable by reason of there being no market for goods of the description

at the place of delivery, the jury in assessing the damages must ascertain the cost price of the goods and the expense of transit, if any, and add to these items such a sum for importer's profits as in their discretion shall appear reasonable. (*O'Hanlan* v. *Great Western Rail. Co.*, 34 L. J., Q. B. 154; 6 B. & S. 484.) And in a recent case, where an article of machinery had been lost on the way, the owner was held entitled to the cost of replacing the article at the end of the transit, with five per cent. interest on the amount until judgment. (*British Columbia Saw Mill Co.* v. *Nettleship*, L. R., 3 C. P. 499; 37 L. J., C. P. 235.) If there has been a *bonâ fide* contract to re-sell the goods, the price at which they have been re-sold will be evidence of their value. (*Borries* v. *Hutchinson*, 34 L. J., C. P. 169; 18 C. B., N. S. 445.)

Articles within the Carriers' Act.

If the goods consist of articles within the Carriers' Act, the owner may recover, not the declared value, but the actual proved damages, not exceeding the declared value of the goods, together with the increased charges paid over and above the ordinary rate of charge. (1 Will. 4, c. 68, ss. 7, 9.)

Declared value of animals.

In the case of animals, if the customer make a false declaration of value, he can only recover the declared value. (*M'Cance* v. *London and North Western Rail. Co.*, 34 L. J., Ex. 39; 3 H. & C. 343.)

Company only liable for the reasonable consequences of loss of goods.

And a company are responsible, on the loss of goods, only for the reasonable consequences of their breach of contract; so that where a plan and model sent to compete for a prize were lost, the proper measure of damages was held to be the value of the labour and materials expended in

making the article, and not damages from losing the chance of obtaining the prize, the latter being too remote a ground of damages. (*Lythgoe* v. *East Anglia Rail. Co.*, 15 Jurist, 400.)

Partial loss.

If the goods are only partially destroyed, or are deteriorated in quality, the same principles are applicable as in the case of total loss; and the damage recoverable is the difference in their value if they had been delivered sound at their destination, and their value as it was at the time, place, and condition in which they were actually delivered. (*Collard* v. *South Eastern Rail. Co.*, 30 L. J., Ex. 393; 7 H. & N. 79.) In this case, the injury to the goods was such that they could only be made saleable by the performance of an operation which caused delay, and the damage allowed was the difference between their value at the time when they should have been delivered sound, and their value after they had been so treated, which included not only depreciation in intrinsic value, but fall of price during the delay.

Consequential loss.

The most difficult cases are those where the goods have been delivered in good condition, but have been delayed in the transit and delivery, and the customer claims for loss of market or loss of profit in consequence of this delay.

Nominal damages for delay amounting to breach of contract.

If there has been delay amounting to a breach of contract, it seems the plaintiff is entitled to nominal damages, though no special damage be proved, and the plaintiff must not be nonsuited. (*Roberts* v. *Midland Rail. Co.*, 25 W. R. 323; *Robinson* v. *Great Western Rail. Co.*, 35 L. J., C. P. 123, per Erle, C. J.)

Rule as to amount of damage.

But if the plaintiff has sustained actual damage, he is not always entitled to recover the full amount. Where there has been an unreasonable delay in the delivery of goods, the damages *primâ facie* would be the difference in the value of the goods at the place of destination at the time they ought to have been delivered, and their value at the time when they are delivered in fact. (*Horn* v. *Midland Rail. Co.*, 42 L. J., C. P. 59; L. R., 8 C. P. 131.) Any loss above this difference sustained by the plaintiff, not from the delay alone, but out of his own special arrangements or circumstances, cannot be recovered in the absence of a special contract, express or implied. (*Ib.*) But if the intended use and application of the goods to be carried was expressly brought to the notice of the company's servants at the time they received them, or could be reasonably inferred from circumstances known to them, so that the special use or application might be fairly considered to be within the contemplation of both parties to the contract, the consignor is entitled to recover the damages naturally resulting from his so being unable to use or apply the goods, since both parties may be said to have made this the basis of the contract. (*Simpson* v. *London and North Western Rail. Co.*, 45 L. J., Q. B. 182; L. R., 1 Q. B. D. 274.) It is clear the company may refuse to accept the goods on the basis of such a special liability, but if they accept without objection they acquiesce in the liability. But merely labelling goods as "travellers' goods" was held not to affect a company with notice, so as to make them liable for special

damages for delay in the delivery. (*Candy* v. *Midland Rail. Co.*, 38 L. T., N. S. 226.)

With notice, company liable for loss of market,

In many cases of claim for loss of market, the company have constructive notice from the apparent nature of the goods, their destination, or from previous dealings, that they are being sent to a particular market, and therefore they are clearly bound to recompense the owner the reasonable loss flowing from his being disappointed of the market; and where the customer stipulates that the goods shall be sent the same evening a special contract is created, and the company may be sued for the breach of it. (*Pickford* v. *Grand Junction Rail. Co.*, 12 M. & W. 766.)

and profits on sales at an exhibition,

Where the plaintiff was a dealer in cattle spice, and was in the habit of going about to agricultural shows exhibiting samples, and having exhibited them at a show at B., was desirous of exhibiting them at another show at N. The defendant railway company had a special office in the show ground at B. for the purpose of receiving and forwarding exhibited goods, and the plaintiff's agent delivered his wares to the defendant's clerk, who supplied a blank consignment note which was filled up by the plaintiff's agent describing the goods as sundries, addressed to the N. show ground and indorsed "must be delivered on Monday certain." The goods not having been delivered on Monday, nor in time for the show, it was held that the plaintiff was entitled to recover the damages resulting from the defendant's failure to deliver in time, that was, his expenses and loss of profits. (*Simpson* v. *London and North Western Rail. Co.*, *supra.*)

and for not being able to perform a contract.

Where the plaintiffs were to the knowledge of the defendant under contract with the Admiralty to deliver coals on or before a certain date, it was held that the defendant was liable, on his failure to carry for them according to his contract, to damages incurred by the plaintiffs in consequence of their not being able to perform their contract with the Admiralty, or rendering such performance more expensive, notwithstanding the defendant was not aware of the exact terms of the contract. (*Prior* v. *Wilson*, 8 W. R. 260; and see *Smeed* v. *Foord*, 28 L. J., Q. B. 178; 1 E. & E. 602; Mayne on Damages, p. 19, 3rd ed.)

Without notice, company not liable for—

But the company must have actual or constructive notice of the extraordinary damages likely to result from delay in transit, or they will not be liable for such damages. (*Hadley* v. *Baxendale*, 23 L. J., Ex. 179; 9 Ex. 341.)

Loss of profits on a contract;

In *Horn* v. *Midland Rail. Co.* (42 L. J., C. P. 59; L. R., 8 C. P. 131), the plaintiff had a contract to deliver goods in London, at a given date, at an exceptionally high price. Notice was given to the station master that they must be delivered at the given date, and if not so delivered, they would be thrown on the plaintiff's hands, but nothing was said about the exceptional character of the contract, or the unusually high price of the goods. The company failing to deliver within the time, it was held that they were not liable for the profit lost by the plaintiff under his contract by the exceptional price of the goods.

Loss of profit by stoppage of a mill;

Where the delivery of a shaft was delayed an unreasonable time, by which a mill was stopped,

it was held that inasmuch as the carrier had no notice that the profits of the mill would be thereby stopped, he would not be liable for the loss thereof. (*Hadley* v. *Baxendale*, *supra*.) And where the plaintiff, a clothier, sent a parcel of goods to his traveller at C., without notice to the company of the object for which the goods were sent, and their delivery was, through the company's negligence, delayed until after the traveller left C., and the plaintiff in consequence lost the profits which he would have derived from sales at C.; it was held that, in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover such profits as damages for the delay. (*Great Western Rail. Co.* v. *Redmayne*, L. R., 1 C. P. 329.)

Upon orders for goods;

In an action for delay in delivering skins for making gloves, the plaintiff was held not entitled to recover the loss in wages paid to workmen kept idle in consequence of their non-arrival. (*Le Peintur* v. *South Eastern Rail. Co.*, 2 L. T., N. S. 170.) So a commercial traveller was not allowed his hotel expenses during two days which he had been delayed by the non-arrival of his case of goods sent by luggage train without any intimation of any kind respecting it (*Woodger* v. *Great Western Rail. Co.*, 36 L. J., C. P. 177; L. R., 2 C. P. 318); but reasonable costs incurred in searching and inquiring for the goods would be recoverable. (*Hales* v. *London and North Western Rail. Co.*, 32 L. J., Q. B. 292; 4 B. & S. 66.)

Loss of wages.

Hotel expenses.

Expenses of searching.

In *Gee* v. *Lancashire and Yorkshire Rail. Co.* (30 L. J., Ex. 11; 6 H. & N. 211), the

Loss of wages and profits.

plaintiffs were not allowed to recover loss of wages paid to workpeople, and of profits they would have made, in consequence of their mill being stopped through failure of the company to deliver cotton within their usual time: for though they had communicated the fact of their mill being stopped, in consequence of non-delivery to the servants of the company at the place of destination, they had not done so at the time and place of delivery.

Loss of season.

In *Wilson* v. *Lancashire and Yorkshire Rail. Co.* (30 L. J., C. P. 232; 9 C. B., N. S. 632), where an action was brought against a company for damage for loss sustained by delay in delivery of cloth, by which the plaintiff, who was a cap maker, lost the season for making it into caps, and so disposing of it; it was held that although the plaintiff could not recover his loss of profits, yet the jury might take into consideration the deterioration in the marketable value of the cloth by reason of the season having passed for making caps.

Loss of business.

In *Crouch* v. *Great Northern Rail. Co.* (25 L. J., Ex. 137; 11 Ex. 742), where a company refused to carry, at the ordinary rate, packed parcels for a carrier, whereby he was obliged to send them a more circuitous route at a greater expense, it was held that he was not entitled to recover damages for alleged loss of business, as the declaration was framed; but, per Martin, B., if the fact had been that the plaintiff was a carrier whose business consisted in collecting goods to be forwarded by the defendants' railway, and the defendants designedly refused to carry his goods, which they were bound

by law to do, in order to obtain a monopoly and destroy the plaintiff's business, under such circumstances a jury would be justified in giving very heavy damages.

The loss must be an appreciable one.

No damages can be recovered which are incapable of being specifically stated and appreciated, as for instance, any inconvenience or vexation the plaintiff may have suffered. (*Hamlin* v. *Great Northern Rail. Co.*, 26 L. J., Ex. 20; 1 H. & N. 408; and see *Hobbs* v. *London and South Western Rail. Co.*, 44 L. J., Q. B. 49; L. R., 10 Q. B. 111.)

Throwing goods on the hands of the company.

Where a hawker delivered goods at C. to be carried to S., and was told by the booking-clerk that the transit would take two days; two days after he called at S. and was told they had not arrived, and he received the same answer on several occasions during the nine days following; it was held that he was entitled to throw the goods on the hands of the company and sue for the value. (*Levene* v. *Great Western Rail. Co.*, 18 L. T., N. S. 295.)

Principles of the cases.

The cases decided on claims for consequential loss seem to have established the following principles:—

1. That damages beyond the difference in market values will not be allowed unless the consequences of delay are communicated to or known by the company at the time and place of delivery to them.
2. That only such loss can be recovered as was reasonably contemplated by both parties at the time the contract for carriage was made,

and not loss arising out of circumstances then wholly unknown to the company.

3. That damages will be given only for the reasonable and proximate, and not for the remote consequences of the breach of contract.

APPENDIX.

CARRIERS' ACT.

1 WILL. IV. CAP. 68.

An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof. [23rd July, 1830.]

Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage coach proprietors, and common carriers for hire is greatly increased: And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to

Mail contractors, coach proprietors

and carriers not to be liable for loss of certain goods above the value of 10*l.* unless delivered as such, and increased charge accepted.

any article or articles or property of the descriptions following; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

When any parcel shall be so delivered an increased rate of charge may be demanded. Notice of the same to be affixed in offices or warehouses.

II. And be it further enacted, that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons

sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

Carriers to give receipts, acknowledging increased rate.

III. Provided always, and be it further enacted, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

In case of neglect to give receipt or affix notice, the party not to be entitled to benefit of this act.

Publication of notices not to limit the liability of proprietors, &c., in respect of any other goods conveyed.

IV. Provided always, and be it enacted, that from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss of any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Every office used to be deemed a receiving house;

and any one coach proprietor or carrier

V. And be it further enacted, that for the purposes of this act every office, warehouse or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carrier shall be liable to be sued by his, her, or

shall be liable to be sued.

their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

Not to affect contracts.

VI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandizes.

Parties entitled to damages for loss may also recover back extra charges.

VII. Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels or packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Nothing herein to protect felonious acts.

VIII. Provided also, and be it further enacted, that nothing in this act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

Coach proprietors and carriers liable only to such damages as are proved.

IX. Provided also, and be it further enacted, that such mail contractors, stage coach proprietors, or other common carriers for hire shall not be concluded as to the value of any such parcel or package by the value so declared as aforesaid, but that he or they shall in all cases be entitled to require, from the party suing in respect of any loss or injury, proof of the actual value of the contents by the ordinary legal evidence, and that the mail contractors, stage coach proprietors, or other common carriers as aforesaid shall be liable to such damages only as shall be so proved as aforesaid, not exceeding the declared value, together with the increased charges as before mentioned.

X. And be it further enacted, that in all actions to be brought against any such mail contractor, stage coach proprietor, or other common carrier as aforesaid, for the loss of or injury to any goods delivered to be carried, whether the value of such goods shall have been declared or not, it shall be lawful for the defendant or defendants to pay money into court in the same manner and with the same effect as money may be paid into court in any other action. Money may be paid into Court in all actions for loss of goods.

XI. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded. Public act.

RAILWAY AND CANAL TRAFFIC ACT, 1854.

17 & 18 Vict. cap. 31.

An Act for the better Regulation of the Traffic on Railways and Canals. [10th July, 1854.]

Whereas it is expedient to make better provision for regulating the traffic on railways and canals: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I. In the construction of this act "the Board of Trade" shall mean the lords of the committee of her Majesty's privy council for trade and foreign plantations; "Board of Trade:"

The word "traffic" shall include not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company; "Traffic:"

The word "railway" shall include every station of or belonging to such railway used for the purposes of public traffic; and "Railway:"

The word "canal" shall include any navigation whereon tolls are levied by authority of parliament, and also the wharves and landing places of and belonging to "Canal:"

such canal or navigation, and used for the purposes of public traffic;

"Company." The expression "railway company," "canal company," or "railway and canal company," shall include any person being the owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any act of parliament;

Stations. A station, terminus, or wharf shall be deemed to be near another station, terminus, or wharf when the distance between such stations, termini, or wharves shall not exceed one mile, such stations not being situate within five miles from Saint Paul's Church, in London.

Duty of railway companies to make arrangements for receiving and forwarding traffic, without unreasonable delay, and without partiality.

II. Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies be at all times afforded to the public in that behalf.

Parties complaining that

III. It shall be lawful for any company or person complaining against any such companies or company of any-

thing done, or of any omission made in violation or contravention of this act, to apply in a summary way, by motion or summons, in England, to her Majesty's Court of Common Pleas at Westminster, or in Ireland to any of her Majesty's Superior Courts in Dublin, or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such Court; and, upon the certificate to her Majesty's attorney-general in England or Ireland, or her Majesty's lord advocate in Scotland, of the Board of Trade alleging any such violation or contravention of this act by any such companies or company, it shall also be lawful for the said attorney-general or lord advocate to apply in like manner to any such Court or judge, and in either of such cases it shall be lawful for such Court or judge to hear and determine the matter of such complaint; and for that purpose, if such Court or judge shall think fit, to direct and prosecute, in such mode and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable such Court or judge to form a just judgment on the matter of such complaint; and if it be made to appear to such Court or judge on such hearing, or on the report of any such person, that anything has been done or omission made, in violation or contravention of this act, by such company or companies, it shall be lawful for such Court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict it shall be lawful for such Court or judge to order that a writ or writs of attachment, or any other process of such Court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and such Court or judge may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies of such sum of money as such Court or judge shall determine, not exceeding for each company the sum of two hundred pounds for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict; and such monies shall be payable as the Court or judge may direct, either to the party complaining, or into Court to abide the ultimate decision of the Court, or to her Majesty, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced

reasonable facilities for forwarding traffic, &c. are withheld, may apply by motion or summons to the Superior Courts.

by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by decree or judgment in any superior Court at Westminster or Dublin, in England or Ireland, and in Scotland by such diligence as is competent on an extracted decree of the court of session; and in any such proceeding as aforesaid, such Court or judge may order and determine that all or any costs thereof or thereon incurred shall and may be paid by or to the one party or the other, as such Court or judge shall think fit; and it shall be lawful for any such engineer, barrister, or other person, if directed so to do by such Court or judge, to receive evidence on oath relating to the matter of any such inquiry, and to administer such oath.

Judges may make such regulations as may be necessary for proceedings under this act.

IV. It shall be lawful for the said Court of Common Pleas at Westminster, or any three of the judges thereof, of whom the chief justice shall be one, and it shall be lawful for the said courts in Dublin, or any nine of the judges thereof, of whom the lord chancellor, the master of the rolls, the lords chief justice of the Queen's Bench and Common Pleas, and the lord chief baron of the Exchequer, shall be five, from time to time to make all such general rules and orders as to the forms of proceedings and process, and all other matters and things touching the practice and otherwise in carrying this act into execution before such Courts and judges, as they may think fit, in England or Ireland, and in Scotland it shall be lawful for the court of session to make such acts of sederunt for the like purpose as they shall think fit.

Court or judge may order a rehearing.

V. Upon the application of any party aggrieved by the order made upon any such motion or summons as aforesaid, it shall be lawful for the Court or judge by whom such order was made, to direct, if they think fit so to do, such motion or application on summons to be reheard before such Court or judge, and upon such rehearing to rescind or vary such order.

Mode of proceeding under this act.

VI. No proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway or canal or railway and canal company under the existing law.

Company

VII. Every such company as aforesaid shall be liable

for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say,) for any horse fifty pounds; for any neat cattle, per head, fifteen pounds; for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable percentage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such percentage or increased rate of charge shall be notified in the manner prescribed in the statute eleventh George Fourth and first William Fourth, chapter sixty-eight, and shall be binding upon such company in the manner therein mentioned: Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of the eleventh George Fourth and first William

to be liable for neglect or default in the carriage of goods, notwithstanding notice to the contrary.

Company not to be liable beyond a limited amount in certain cases, unless the value declared and extra payment made.

Proof of value to be on the person claiming compensation.

No special contract to be binding unless signed.

Saving of Carriers Act, 11 Geo. 4 & 1 Will. 4, c. 68.

Fourth, chapter sixty-eight, with respect to articles of the descriptions mentioned in the said act.

Short title.

VIII. This act may be cited for all purposes as "The Railway and Canal Traffic Act, 1854."

THE REGULATION OF RAILWAYS ACT, 1868.

31 & 32 Vict. c. 119.

Obligations and Liability of Companies as Carriers.

Liability of company during sea transit.

14. Where a company by through booking contracts to carry any animals, luggage, or goods from place to place partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, luggage, or goods by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever kind and nature soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid as part of the contract between the consignor of such animals, luggage, or goods and the company in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "company" includes the owners, lessees, or managers of any canal or other inland navigation.

Provision for securing equality of treatment where railway company works steam vessels.

16. Where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working, steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case tolls shall be at all times charged to all persons equally and after the same rate in respect of passengers conveyed in a like vessel passing between the same places under like circumstances; and no reduction or advance in the tolls

shall be made in favour of or against any person using the steam vessels in consequence of his having travelled or being about to travel on the whole or any part of the company's railway, or not having travelled or not being about to travel on any part thereof, or in favour of or against any person using the railway in consequence of his having used or being about to use, or his not having used or not being about to use, the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway.

The provisions of the Railway and Canal Traffic Act, 1854, so far as the same are applicable, shall extend to the steam vessels and to the traffic carried on thereby.

Company bound to furnish particulars of charges for goods.

17. Where any charge shall have been made by a company in respect of the conveyance of goods over their railway, on application in writing within one week after payment of the said charge made to the secretary of the company by the person by whom or on whose account the same has been paid, the company shall within fourteen days render an account to the person so applying for the same, distinguishing how much of the said charge is for the conveyance of the said goods on the railway, including therein tolls for the use of the railway, for the use of carriages, and for locomotive power, and how much of such charge is for loading and unloading, covering, collection, delivery, and for other expenses, but without particularizing the several items of which the last-mentioned portion of the charge may consist.

Charge when two railways worked by one company.

18. Where two railways are worked by one company, then in the calculation of tolls and charges for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles) conveyed on both railways, the distances traversed shall be reckoned continuously on such railways as if they were one railway.

REGULATION OF RAILWAYS ACT, 1873.

36 & 37 VICT. CAP. 48.

An Act to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith.

[21st July, 1873.]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

Short title.

1. This act may be cited as the Regulation of Railways Act, 1873.

Commencement of act.

2. This act shall, except as herein is otherwise expressly provided, come into operation on the first day of September, one thousand eight hundred and seventy-three, which date is in this act referred to as the commencement of this act.

Definitions.

3. In this act—

The term "railway company" includes any person being the owner or lessee of or working any railway in the United Kingdom constructed or carried on under the powers of any act of parliament:

The term "canal company" includes any person being the owner or lessee of, or working, or entitled to charge tolls for the use of any canal in the United Kingdom constructed or carried on under the powers of any act of parliament:

The term "person" includes a body of persons corporate or unincorporate:

The term "railway" includes every station, siding, wharf, or dock of or belonging to such railway and used for the purposes of public traffic:

The term "canal" includes any navigation which has been made under or upon which tolls may be levied by authority of parliament, and also the wharves and landing-places of and belonging to such canal or navigation, and used for the purposes of public traffic:

The term "traffic" includes not only passengers and their luggage, goods, animals, and other things conveyed by any railway company or canal company, but also carriages, waggons, trucks, boats, and

vehicles of every description adapted for running or passing on the railway or canal of any such company:

The term "mails" includes mail bags and post-letter bags:

The term "special act" means a local or local and personal act, or an act of a local and personal nature, and includes a provisional order of the Board of Trade confirmed by act of parliament, and a certificate granted by the Board of Trade under the Railways Construction Facilities Act, 1864:

The term "the treasury" means the commissioners of her Majesty's treasury for the time being:

The term "superior court" means in England any of her Majesty's superior courts at Westminster, in Ireland any of her Majesty's superior courts at Dublin, and in Scotland the court of session.

Appointment and Duties of Railway Commissioners.

Appointment of Railway Commissioners.

4. For the purpose of carrying into effect the provisions of the Railway and Canal Traffic Act, 1854, and of this act, it shall be lawful for her Majesty, at any time after the passing of this act, by warrant under the royal sign manual, to appoint not more than three commissioners, of whom one shall be of experience in the law and one of experience in railway business, and not more than two assistant commissioners, and upon the occurrence of any vacancy in the office of any such commissioner or assistant commissioner from time to time in like manner to appoint some fit person to fill the vacancy. It shall be lawful for the Lord Chancellor, if he think fit, to remove for inability or misbehaviour any commissioner appointed in pursuance of this act.

The three commissioners appointed under this act (and in this act referred to as the commissioners) shall be styled the railway commissioners, and shall have an official seal which shall be judicially noticed. They may act notwithstanding any vacancy in their number. The said assistant commissioners shall hold office during the pleasure of her Majesty.

Commissioners not to be interested in railway or canal stock.

5. Any person appointed a commissioner under this act shall within three calendar months after his appointment absolutely sell and dispose of any stock, share, debenture stock, debenture bond, or other security of any railway or canal company in the United Kingdom which he shall at the time of his appointment own or be interested in for his own benefit; and it shall not be lawful

for any person appointed a commissioner under this act, so long as he shall hold office as such commissioner, to purchase, take, or become interested in for his own benefit any such stock, share, debenture stock, debenture bond, or other security; and if any such stock, share, debenture stock, debenture bond, or other security, or any interest therein, shall come to or vest in such commissioner by will or succession, for his own benefit, he shall within three calendar months after the same shall so come to or vest in him absolutely sell and dispose of the same or his interest therein.

It shall not be lawful for the commissioners, except by consent of the parties to the proceedings, to exercise any jurisdiction by this act conferred upon them in any case in which they shall be, directly or indirectly, interested in the matter in question.

The commissioners shall devote the whole of their time to the performance of their duties under this act, and shall not accept or hold any office or employment inconsistent with this provision.

Transfer to Commissioners of jurisdiction under 17 & 18 Vict. c. 31, s. 3.

6. Any person complaining of anything done or of any omission made in violation or contravention of section two of the Railway and Canal Traffic Act, 1854, or of section sixteen of the Regulation of Railways Act, 1868, or of this act, or of any enactment amending or applying the said enactments respectively, may apply to the commissioners, and upon the certificate of the Board of Trade alleging any such violation or contravention any person appointed by the Board of Trade in that behalf may in like manner apply to the commissioners; and for the purpose of enabling the commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section three of the Railway and Canal Traffic Act, 1854, on the several Courts and judges empowered to hear and determine complaints under that act; and may make orders of like nature with the writs and orders authorized to be issued and made by the said Courts and judges; and the said Courts and judges shall, except for the purpose of enforcing any decision or order of the commissioners, cease to exercise the jurisdiction conferred on them by that section.

Power for Commissioners to enable companies to explain

7. Where the commissioners have received any complaint alleging the infringement by a railway company or canal company of the provisions of any enactment in respect of which the commissioners have jurisdiction, they may, if they think fit, before requiring or permitting any

formal proceedings to be taken on such complaint, communicate the same to the company against whom it is made, so as to afford them an opportunity of making such observations thereon as they may think fit. alleged violation of law.

8. Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special act, passed either before or after the passing of this act, required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference and with the consent of the commissioners, be referred to the commissioners for their decision in lieu of being referred to arbitration: provided, that the power of compelling a reference to the commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special act, the commissioners are of opinion that the difference in question may more conveniently be referred to him. Differences between railway and canal companies to be referred to Commissioners.

9. Any difference to which a railway company or canal company is a party, may, on the application of the parties to the difference, and with the assent of the commissioners, be referred to them for their decision. Power to refer differences to Commissioners.

10. The following powers and duties of the Board of Trade shall be transferred to the commissioners; namely, Transfer to Commissioners of certain powers and duties of the Board of Trade.

(1) The powers of the Board of Trade under Part III. of the Railways Clauses Act, 1863, or under any special act, with respect to the approval of working agreements between railway companies; and,

(2) The powers and duties of the Board of Trade under section thirty-five of the Railways Clauses Act, 1863, with respect to the exercise by railway companies of their powers in relation to steam vessels: 26 & 27 Vict. c. 92.

And the provisions of the said acts conferring such powers or imposing such duties, or otherwise referring to such powers or duties, shall, so far as is consistent with the tenor thereof, be read as if the commissioners were therein named instead of the Board of Trade.

Explanation and Amendment of Law.

11. Whereas by section two of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company and railway and canal company shall, Explanation of 17 & 18 Vict. c. 31, s. 2,

as to through traffic.

according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

And whereas it is expedient to explain and amend the said enactment: Be it therefore enacted, that—

Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this act referred to as through rates).

Provided as follows:

(1.) The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded:

(2.) Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice inform the company requiring the traffic to be forwarded whether they agree to the

rate and route; and, if they object to either, the grounds of the objection:

(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration:

(4.) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision:

(5.) If an objection be made to the granting of the rate or to the route, the commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly:

(6.) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

(7.) The commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

(8.) It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route:

(9.) The prescribed period mentioned in this section shall be ten days, or such longer period as the commissioners may from time to time by general order prescribe.

Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports,

the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

Powers of Commissioners as to through rates.

12. Subject to the provisions in the last preceding section contained, the commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

Provision for complaints by public authority in certain cases.

13. A complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by this act, may be made to the commissioners by a municipal or other public corporation, local or harbour board, without proof that the complainants are aggrieved by the contravention: provided that a complaint shall not be entertained by the commissioners in pursuance of this section, unless such complaint is accompanied by a certificate of the Board of Trade to the effect that in their opinion the case in respect of which the complaint is made is a proper one to be submitted for adjudication to the commissioners by such municipal or other public corporation, local or harbour board.

Publication of rates.

14. Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged.

Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee.

The commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses.

Any company failing to comply with the provisions of this section shall for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding five pounds, and such penalty shall be recovered and applied in the same manner as penalties imposed by the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, (as the case may require,) are for the time being recoverable and applicable.

Power to Commissioners to fix terminal charges.

15. The commissioners shall have power to hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any act of parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering collection, delivery, and other services of a like nature; any decision of the commissioners under this section shall be binding on all courts and in all legal proceedings whatsoever.

Arrangements between railway companies and canal companies.

16. No railway company or canal company, unless expressly authorized thereto by any act passed before the passing of this act, shall, without the sanction of the commissioners, to be signified in such manner as they may by general order or otherwise direct, enter into any agreement whereby any control over or right to interfere in or concerning the traffic carried or rates or tolls levied on any part of a canal is given to the railway company, or any persons managing or connected with the management of any railway; and any such agreement made after the commencement of this act without such sanction shall be void.

The commissioners shall withhold their sanction from any such agreement which is in their opinion prejudicial to the interests of the public.

Not less than one month before any such agreement is so sanctioned, copies of the intended agreement certified under the hand of the secretary of the railway company or one of the railway companies party or parties thereto, shall be deposited for public inspection at the office of the commissioners, and also at the office of the clerk of the peace of the county, riding, or division in England or Ireland in which the head office of any canal company party to the agreement is situate, and at the office of the principal sheriff clerk of every such county in Scotland, and notice of the intended agreement, setting forth the parties between whom or on whose behalf the same is in-

tended to be made, and such further particulars with respect thereto as the commissioners may require, shall be given by advertisement in the London, Edinburgh, or Dublin Gazette, according as the head office of any canal company party to the agreement is situate in England, Scotland, or Ireland, and shall be sent to the secretary or principal officer of every canal company any of whose canals communicates with the canal of any company party to the agreement; and shall be published in such other way, if any, as the commissioners for the purpose of giving notice to all parties interested therein by order direct.

Maintenance of canals by railway companies.

17. Every railway company owning or having the management of any canal or part of a canal shall at all times keep and maintain such canal or part, and all the reservoirs, works, and conveniences thereto belonging, thoroughly repaired and dredged and in good working condition, and shall preserve the supplies of water to the same, so that the whole of such canal or part may be at all times kept open and navigable for the use of all persons desirous to use and navigate the same without any unnecessary hindrance, interruption or delay.

Conveyance of Mails.

Conveyance of mails.

18. Every railway company shall convey by any train all such mails as may be tendered for conveyance by such train, whether such mails be under the charge of a guard appointed by the postmaster-general or not, and notwithstanding that no notice in writing requiring mails to be conveyed by such train has been given to the company by the postmaster-general.

Every railway company shall afford all reasonable facilities for the receipt and delivery of mails at any of their stations without requiring them to be booked or interposing any other delay.

Where the mails are in charge of a guard appointed by the postmaster-general, every railway company shall permit such guard, if he think fit, to receive and deliver them at any station by himself or his assistants, rendering him nevertheless such aid as he may require.

Remuneration for conveyance of mails.

19. Every railway company shall be entitled to reasonable remuneration for any services performed by them in pursuance of this act with respect to the conveyance of mails, and such remuneration shall be paid by the postmaster-general.

Any difference between the postmaster-general and any

railway company as to the amount of such remuneration, or as to any other question arising under this act, shall be decided by arbitration, in manner provided by the act of the session of the first and second years of the reign of her present Majesty, chapter ninety-eight, or, at the option of such railway company, by the commissioners.

Conveyance of mails on steam vessels.

20. Where a railway company use, maintain, or work, or are party to any arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, all provisions contained in any act with respect to the conveyance of mails by railways shall, so far as they are applicable to the conveyance of mails by steam vessels, extend to the steam vessels so used, maintained, or worked.

Regulations as to Commissioners.

Assistant-commissioners.

21. The assistant-commissioners shall be subject to the orders of the commissioners, and shall make such inquiries and reports and perform such other acts and services as the commissioners may direct; and it shall be lawful for such assistant-commissioners, or either of them, to undertake such arbitration under the act as the commissioners with the consent of the parties to such arbitration may direct; and the said assistant-commissioners for the purposes of such inquiries, reports, and arbitrations shall have and may exercise all powers of entry, inspection, summoning and examining witnesses, requiring the production of documents, and administering an oath by this act conferred upon the commissioners.

Salary of Commissioners.

22. There shall be paid to each of the commissioners such salary, not exceeding three thousand pounds a year, and to each assistant-commissioner such salary not exceeding fifteen hundred pounds a year, as the treasury determine.

The salaries and expenses of the commissioners and of their officers and of the assistant-commissioners shall be paid out of moneys to be provided by parliament.

Assessors.

23. The commissioners may from time to time, in the exercise of any jurisdiction in this act conferred on them, with the consent of the treasury, call in the aid of one or more assessors, who shall be persons of engineering or other technical knowledge. There shall be paid to such assessors such remuneration as the treasury, upon the recommendation of the commissioners, may direct.

Appointment of officers.

24. The commissioners may from time to time appoint such officers and clerks with such salaries as the commissioners, with the sanction of the treasury, think fit.

Powers of Commissioners.

25. For the purposes of this act the commissioners shall, subject as in this act mentioned, have full power to decide all questions whether of law or of fact, and shall also have the following powers; that is to say,

(a) They may, by themselves or by any person appointed by them to prosecute an inquiry, enter and inspect any place or building, being the property or under the control of any railway or canal company, the entry or inspection of which appears to them requisite;

(b) They may require the attendance of all such persons as they think fit to call before them and examine, and may require answers or returns to such inquiries as they think fit to make;

(c) They may require the production of all books, papers, and documents relating to the matters before them;

(d) They may administer an oath;

(e) They may when sitting in open court punish for contempt in like manner as if they were a court of record.

Every person required by the commissioners to attend as a witness shall be allowed such expenses as would be allowed to a witness attending on a subpœna before a court of record; and in case of dispute as to the amount to be allowed, the same shall be referred to a master of one of the superior courts, who, on request, under the hands of the commissioners, shall ascertain and certify the proper amount of such expenses.

Orders of Commissioners.

26. Any decision or any order made by the commissioners for the purpose of carrying into effect any of the provisions of this act may be made a rule or order of any superior court, and shall be enforced either in the manner directed by section three of the Railway and Canal Traffic Act, 1854, as to the writs and orders therein mentioned, or in like manner as any rule or order of such court.

For the purpose of carrying into effect this section, general rules and orders may be made by any superior court in the same manner as general rules and orders may be made with respect to any other proceedings in such court.

The commissioners may review and rescind or vary any

decision or order previously made by them or any of them.

The commissioners shall, in all proceedings before them under sections 6, 11, 12, and 13 of this act, and may, if they think fit, in all other proceedings before them under this act, at the instance of any party to the proceedings before them, and upon such security being given by the appellant as the commissioners may direct, state a case in writing for the opinion of any superior court determined by the commissioners upon any question which in the opinion of the commissioners is a question of law.

The court to which the case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the commissioners with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such order as to costs, as to the court may seem fit, and all such orders shall be final and conclusive on all parties: provided that the commissioners shall not be liable to any costs in respect or by reason of any such appeal.

The operation of any decision or order made by the commissioners shall not be stayed pending the decision of any such appeal, unless the commissioners shall otherwise order.

Save as aforesaid, every decision and order of the commissioners shall be final.

Sittings of Commissioners.

27. The commissioners shall sit at such times and in such places and conduct their proceedings in such manner as may seem to them most convenient for the speedy despatch of business; they may, subject as in this act mentioned, sit either together or separately, and either in private or in open court, but any complaint made to them shall, on the application of any party to the complaint, be heard and determined in open court.

Costs.

28. The costs of and incidental to any proceeding before the commissioners shall be in the discretion of the commissioners.

Power of Commissioners to make general orders.

29. The commissioners may at any time after the passing of this act and from time to time make such general orders as may be requisite for the regulation of proceedings before them, including applications for and the stating of cases for appeal, and also for prescribing, directing, or regulating any matter which they are

authorized by this act to prescribe, direct, or regulate by general order, and also for enabling the commissioners in cases to be specified in such general orders to exercise their jurisdiction by any one or two of their number: provided, that any person aggrieved by any decision or order made in any case so specified may require a rehearing by all the commissioners; they may further make regulations for enabling them to carry into effect the provisions of this act, and may from time to time revoke and alter any general orders or regulations made in pursuance of this act. Every general order, and every alteration in a general order, made in pursuance of this section, shall be submitted to the Lord Chancellor for approval, and shall not come into force until it shall be approved by him.

Every general order purporting to be made in pursuance of this act shall, immediately after the making thereof, be laid before both houses of parliament, if parliament be then sitting, or if parliament be not then sitting within seven days after the then next meeting of parliament, and if either house of parliament by a resolution passed within two months after such general order has been so laid before the said house, resolve that the whole or any part of such general order ought not to continue in force, the same shall after the date of such resolution cease to be of any force, without prejudice nevertheless to the making of any other general order in its place, or to anything done in pursuance of such general order before the date of such resolution; but, subject as aforesaid, every general order purporting to be made in pursuance of this act shall be deemed to have been duly made and within the powers of this act, and shall have effect as if it had been enacted in this act.

Evidence of documents.

30. Every document purporting to be signed by the commissioners, or any one of them, shall be received in evidence without proof of such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by the commissioners.

Commissioners to make annual reports.

31. The commissioners shall, once in every year, make a report to her Majesty of their proceedings under this act during the past year, and such report shall be laid before both houses of parliament within fourteen days after the making thereof if parliament is then sitting, and if not, then within fourteen days after the next meeting of parliament.

Miscellaneous.

Determination of fees.

32. The commissioners may, at any time after the passing of this act, by general order, with the concurrence of the treasury, appoint the fees to be taken in relation to proceedings before them, and may from time to time, by general order, with the like concurrence, increase, reduce, or abolish all or any of such fees, and appoint new fees to be taken in relation to such proceedings.

Collection of fees. 29 & 30 Vict. c. 76.

33. The Public Offices Fees Act, 1866, shall apply to all fees taken in relation to any proceedings before the commissioners.

Any fee or payment in the nature or lieu of a fee paid in respect of any proceedings before the commissioners and collected otherwise than by means of stamps shall be paid into the receipt of her Majesty's exchequer in such manner as the treasury from time to time direct, and carried to the consolidated fund.

Taxation of costs.

34. The costs, charges, and expenses of and incidental to any proceedings before the commissioners which are incurred by any person shall, if required, be taxed in the same manner and by the same persons as if such proceedings were proceedings in a superior court.

Notices how to be given.

35. Any notice required or authorized to be given under this act may be in writing or in print, or partly in writing and partly in print, and may be sent by post, and if sent by post shall be deemed to have been received at the time when the letter containing the same would have been delivered in the ordinary course of the post; and in proving such sending it shall be sufficient to prove that the letter containing the notice was prepaid and properly addressed and put into a post office.

Application of act to Scotland.

36. In the application of this act to Scotland—

(1.) The term "attending on subpœna before a court of record" means attending on citation the Court of Justiciary:

(2.) The Queen's and lord treasurer's remembrancer shall perform the duties of a master of one of the superior courts under this act.

Temporary Provisions.

Duration of office and powers of Commissioners.

37. This act shall continue in force for five years next after the passing of this act, and thenceforth until the end of the then next session of parliament, but the expiration of this act shall not affect the validity of anything done before such expiration.

INDEX.

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